Supreme Court, U.S.
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No. _____
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In The
Supreme Court of the United States

ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO and KEVIN J. O'TOOLE,

Petitioners,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DEFOREST B. SOARIES, Secretary of State of New Jersey, and JOHN FARMER, Attorney General of New Jersey,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Voting Rights Act, 42 U.S.C. §1973(b), mandate the creation of influence districts, thereby preventing the State of New Jersey from enforcing Article IV, §2, ¶3 of the New Jersey Constitution requiring New Jersey municipalities to be divided into no more state legislative districts than one plus the whole number obtained by dividing the number of inhabitants in the municipality by the ideal district population, under the 2000 census?

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OPINION BELOW

The New Jersey Supreme Court issued its opinion on July 31, 2003. The decision is reported at 177 N.J. 364, 828 A.2d 840. (App., *infra*, 1a-55a). The January 22, 2003 Appellate Division decision is reported at 357 N.J.Super. 74, 813 A.2d 1264. (App., *infra*, 72a-94a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the New Jersey Constitution, Article IV, §2, ¶3. (App., *infra*, 126a-127a).

The federal statute alleged to be in conflict with this Constitutional provision is the Voting Rights Act, 42 U.S.C. § 1973. (App., *infra*, 128).

STATEMENT

On May 9, 2001, Petitioners Anne M. McNeil of Jersey City, Thomas E. Williams of Newark, Roseanna Siebert of the Borough of Bergenfield, Paul DiGaetano of Nutley, and Kevin O'Toole of the Township of Cedar Grove brought suit in the Superior Court of New Jersey, Mercer County challenging the legislative districting plan for the New Jersey Legislature certified on April 11, 2001 ("the 2001

plan"). They named as defendants the New Jersey Legislative Apportionment Commission ("Commission"), the then Secretary of State of New Jersey and the then Attorney General of New Jersey. Petitioners also sought an order to show cause seeking temporary restraints, which the motion judge denied. (App., *infra*, 124a-125a). Leave to appeal that denial was also denied by both the Appellate Division, and the Supreme Court, of New Jersey. (App., *infra*, 121a-123a). The Commission filed a motion for summary judgment in the Law Division, Mercer County. Petitioners cross-moved for summary judgment on counts one and two of their complaint, the counts that asserted, respectively, that Jersey City and Newark were inappropriately divided among too many legislative districts.

Article IV, §2, ¶3 of the New Jersey Constitution, in relevant part, reads:

> . . . no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the state, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

According to the 2000 census figures, New Jersey's total population was 8,414,350. One fortieth of that figure was 210,359, which is considered the ideal population or goal for each of New Jersey's forty legislative districts. Jersey City's population was 240,055, exceeding the ideal district population by 29,696. Newark's population was 273,546, exceeding the ideal district population by 63,187.

Based on these census numbers, Newark and Jersey City are the only New Jersey municipalities that exceed the ideal population figure of 210,359. Using the formula provided in Article IV, §2, ¶3 of the New Jersey Constitution each of these cities can only be divided into two districts.[1] The 2001 plan divided Jersey City and Newark into three legislative districts each.

Parts of Newark were included in the 27th, 28th, and 29th Districts. The 27th District included: Caldwell, Orange, Essex Fells, Fairfield, Livingston, Maplewood, North Caldwell, Roseland, South Orange, West Caldwell, West Orange, and Newark's West ward voting districts numbers 27 through 29, 33, 35 through 41, and 45. The district's population of 206,390 was 3,969 less than the ideal district population. The Commission calculated that 44.8% of the district's residents were members of minority groups, including 29.6% (61,110) African-American and 6.8% (14,239) Hispanic residents. There were 19,641 Newark residents in the 27th District, including 14,599 African-American and 1,632 Hispanic residents.

The 28th District included: Belleville, Bloomfield, Irvington, and voting districts from parts of Newark's North, South, Central and West wards. The district's population of 217,596 was 7,237 more than the ideal district population. The Commission's figures indicated that 73.5% of the district's residents were members of

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[1] For Newark, 1 + (the whole number resulting from 273,546 divided by 210,359, which is 1.30), so 1+1=2; for Jersey City, 1 + (the whole number resulting from 240,055 divided 210,359, which is 1.14), so 1+1=2.

minority groups, including 51.1% (111,386) African-American and 15% (32,645) Hispanic residents. There were 73,290 Newark residents in the 28th District, including 55,494 African-American and 12,151 Hispanic residents.

The 29th District included: Hillside (in Union County), and voting districts from parts of Newark's North, South, Central and East wards. The district's population of 202,362 was 7,997 less than the ideal district population. The Commission calculated that 79.8% of the district's residents were members of minority groups, including 40.4% (81,951) African-American and 34.5% (69,992) Hispanic residents. There were 180,615 Newark residents in the 29th District, including 71,990 African-American and 66,839 Hispanic residents.

Parts of Jersey City were included in the 31st, 32nd, and 33rd Districts. The 31st District included: all of Bayonne, and in Jersey City, all of the municipal voting districts within ward A, and parts of wards B, C, E and F. The district's population of 207,327 was 3,032 less than the ideal district population. The Commission's figures indicated that 66.0% of the district's residents were members of minority groups, including 28.1% (58,417) African-American and 21.7% (45,120) Hispanic residents. There were 145,485 Jersey City residents in the 31st District, including 55,319 African-American and 34,105 Hispanic residents.

The 32nd District included: Fairview (in Bergen County), East Newark, Harrison, Kearny, North Bergen, and Secaucus (in Hudson County), plus in Jersey City, parts of wards B, C, and D. The district's population of 208,227 was 2,132 less than the ideal district population.

The Commission's figures indicated that 57.8% of the district's residents were members of minority groups, including 4.5% (9,401) African-American and 39.8% (83,054) Hispanic residents. There were 63,635 Jersey City residents in the 32nd District, including 6,138 African-American and 25,392 Hispanic residents.

The 33rd District included: Guttenberg, Hoboken, Union City, Weehawken, West New York, plus in Jersey City, parts of wards C and E. The district's population of 206,676 was 3,683 less than the ideal district population. The Commission's numbers indicated that 68.9% of the district's residents were members of minority groups, including 3% (6,383) African-American and 57.5% (118,860) Hispanic residents. There were 30,935 Jersey City residents in the 33rd District, including 2,932 African-American and 8,455 Hispanic residents.[2]

Petitioners argued, in support of their summary judgment motion, that the 2001 Plan violated the New Jersey Constitution, Article IV, §2, ¶3. Respondents argued, among other things, that the Voting Rights Act required the Commission be given the discretion to deviate from the requirements of the New Jersey Constitution. *McNeil v. Legislative Apportionment Commission* (App., *infra*, 103a; 113a-114a). By an October 12, 2001 order, the Superior Court of New Jersey, Law Division, Mercer County agreed, granted Respondents' motion for summary judgment, and denied Petitioners' motion for summary

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[2] *McNeil v. Legislative Apportionment Commission*, 357 N.J.Super. 74, 81-84, 813 A.2d 1264, 1268-1270 (App. Div. 2003) (App., *infra*, 78a-81a).

judgment. (App., *infra*, 119a-120a). Petitioners filed a timely notice of appeal to the Appellate Division of the Superior Court of New Jersey.

The Appellate Division reversed, declaring that the language of Article IV, §2, ¶3 of the New Jersey Constitution required Newark and Jersey City to be divided into no more than two districts. The Appellate Division explicitly held "[n]o federal law expressly preempts the municipality districting standard [contained in Article IV, §2, ¶3 of the New Jersey Constitution]." *McNeil v. Legislative Apportionment Commission*, 357 N.J.Super. 74, 93, 813 A.2d 1264, 1275 (App. Div. 2003) (App., *infra*, 72a-94a; 94a). The Appellate Division denied Respondent Commission's request for a stay. (App., *infra*, 68a-71a).

The Respondent Commission filed a Motion to Stay the Appellate Division Order in the Supreme Court. After the Motion had been filed and briefed, the Supreme Court of New Jersey asked the parties to brief a question. The question was:

> Can an Apportionment Plan that limits Newark and Jersey City to two districts each be developed in a manner that is consistent with the Federal Voting Rights Act?

On March 6, 2003 the Supreme Court issued the stay. *McNeil v. Legislative Apportionment Commission*, 176 N.J. 484, 825 A.2d 1124 (N.J. 2003) (App., *infra*, 56a-65a). Two Justices joined in a short concurring opinion, one Justice wrote a dissent. 176 N.J. 484, 485-491, 825 A.2d 1124, 1124-1128 (N.J. 2003) (App., *infra*, 58a-65a). On the same day, the Supreme Court of New Jersey granted the Commission's petition for certification, 176 N.J. 71 (2003), (App., *infra*, 66a-67a).

In an opinion issued on July 31, 2003, and reported at 177 N.J. 364, 828 A.2d 840 (App., *infra*, 1a-55a), the New Jersey Supreme Court reversed the Appellate Division decision, holding, "[t]o now create two districts each in Newark and Jersey City would, in the Commission's view and supported by the record, constitute packing in violation of Section 2 of the VRA." *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 384, 828 A.2d 840, 852 (2003) (App., *infra*, 19a). Four Justices joined in the majority opinion, two justices joined in a short dissent, and one Justice wrote a dissenting opinion. *McNeil*, 177 N.J. at 400-411, 828 A.2d at 862-869 (2003) (App., *infra*, 40a-55a).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT IN THE CIRCUIT AND DISTRICT OPINIONS ON THE ISSUE OF WHETHER OR NOT §2 OF THE VOTING RIGHTS ACT RECOGNIZES INFLUENCE DISTRICT CLAIMS

The dispute between the parties over the interplay between the Voting Rights Act and the New Jersey Constitution presents the question of whether or not §2 of the Voting Rights Act requires the State of New Jersey to violate the municipal boundary provision of the New Jersey Constitution so as to sanction a state legislative districting plan that disperses "excess" minority voters from Newark and Jersey City into neighboring districts. In these neighboring districts these minority voters will not constitute a majority; instead, these "excess" minority

voters will constitute an "influential minority" in these "influence districts."[3] Thus, the issue becomes: does §2 of the Voting Rights Act require the creation of so called influence districts when the applicable state constitution forbids creation of the influence districts at issue?

The Supreme Court of New Jersey held that §2 requires influence districts in the case of the excess voters in Newark and Jersey City, under the 2000 census numbers, despite the plain language of Article IV, §2, ¶3 of the New Jersey Constitution. The Court held the 2001 Plan, although in violation of the New Jersey Constitution, could stand because "[i]f the . . . [2001] plan is altered such that Newark and Jersey City residents are placed in only two legislative districts each, that will result in vote dilution and therefore will violate the V[oting] R[ights] A[ct]. The Supremacy Clause interdicts that result." *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 388, 828 A.2d 840, 852 (2003) (App., *infra*, 24a).

A vote dilution claim under §2 of the Voting Rights Act is suggested by footnote 11 in *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986), n. 11. This footnote reads:

> Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective

[3] An "influence districts" is one "in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice. . . . Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient crossover votes from white voters." *Voinovich v. Quilter*, 507 U.S. 146, 150; 154 (1993).

> minority of voters or **from the concentration of blacks into districts where they constitute an excessive majority**. (emphasis supplied)

This Court "has not yet decided whether influence-dilution claims . . . are viable under §2 [of the Voting Rights Act], *Growe* [*v. Emison*,] 507 U.S. [25,] 41, n. 5 (1993); *see Gingles*, *supra*, 478 U.S., at 46-47, nn. 11-12 (leaving open the possibility of influence-dilution claims)." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). This Court has turned down opportunities to decide whether such claims are cognizable under §2 of the Voting Rights Act on four occasions. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-9 (1994); *Voinovich*, 507 U.S. at 156-160; *Growe v. Emison*, 507 U.S. 25, 41 n. 5 (1993); *Gingles*, *supra*, 478 U.S. at 46-47 n. 12.

This void has been filled by the lower Federal Courts. Unfortunately a majority view and a minority view have developed. In the Circuit Courts the majority view is represented by the Fifth, in *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852-53 (CA5 1999), *cert. denied*, 528 U.S. 1114 (2000), the Sixth in *Cousin v. Sundquist*, 145 F.3d 818 (CA6 1998), *cert. denied*, 525 U.S. 1138 (1999) and *Nixon v. Kent County*, 76 F.3d 1381 (CA6 1996), the Seventh in *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (CA7 1988), *cert. denied*, 490 U.S. 1031 (1989), the Ninth in *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n. 7 (CA9 1989) *overruled on other grounds, Townsend v. Holman Consulting*, 914 F.2d 1136 (CA9 1990) and the Eleventh in *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (CA11 1997), all rejecting influence district claims.

The minority view is found in the First and Fifth Circuits. In *Uno v. City of Holyoke*, 72 F.3d 973, 979 n. 2 (CA1 1995) the First Circuit noted the first *Gingles* "precondition will have to be reconfigured to the extent that the courts eventually validate so-called influence dilution claims." In *Campos v. Baytown*, 840 F.2d 1240, 1244 (CA5 1988), *cert. denied*, 492 U.S. 905 (1989) the Fifth Circuit held that aggregating Blacks and Hispanics into a majority satisfies the first *Gingles* precondition, even though neither group by itself can rightly claim majority status.

In the District Courts, the majority view is found in *O'Lear v. Miller*, 222 F.Supp.2d 850, *summarily aff'd*, 537 U.S. 997 (2002), *Parker v. Ohio*, 263 F.Supp.2d 1100 (S.D.Ohio May 23, 2003), and *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003) all holding that a vote dilution claim, such as the one relied on by the New Jersey Supreme Court, is not viable.

The minority view in the District Courts can be found in *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D.Fla. 2002), *Armour v. Ohio*, 775 F.Supp. 1044 (N.D.Ohio 1991), and the concurrence in *Parker, supra*, 263 F.Supp.2d 1100, 1109 (Gwin, J., concurring) all supporting influence district claims.

The Sixth Circuit in *Cousin v. Sundquist*, 145 F.3d 818 (CA6 1998), *cert. denied*, 525 U.S. 1138 (1999), rejected the claim that the Voting Rights Act compelled the creation of a single-member district with a thirty-four percent black voting-age population. 145 F.3d at 829.

> We believe the district court erred in assuming from the *Gingles* footnote and the Senate Report that an influence claim is actionable under Section 2. The Supreme Court's reluctance in

> *Voinovich* to state that Section 2 authorizes such a claim, when the Court was squarely presented with factual circumstances favorable to so holding, suggests that the existence of an influence cause of action should not be inferred from the *Gingles* footnote, which describes a case the Court has never decided, and legislative history that supports the district court's position only by suggestion. We therefore view the plaintiffs' Chancery Court-related claim as an impermissible "influence" claim, wrongly asserted under Section 2 of the Voting Rights Act. *Accord McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947-48 (7th Cir.1988) (concluding that "influence" claims undermine the purpose the *Gingles* preconditions and refusing to consider such claims).

In *Nixon v. Kent County*, 76 F.3d 1381 (CA6 1996), the Sixth Circuit, sitting *en banc*, confirmed that where a single minority group cannot comprise the majority of a proposed district's voting-age population, minorities have no valid §2 objection to a redistricting plan. *Nixon v. Kent County*, 76 F.3d 1381, 1394 (CA6 1996). The Sixth Circuit, in *Nixon*, explained that to elect representatives of their choice members of such a group would, by definition, be required to form political coalitions with members of one or more other groups. *Nixon*, 76 F.3d at 1392. Requiring districts amenable to such bi-racial coalitions would transform "the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *Id.* (*quoting League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 894 (CA5 1993) (*en banc*) (Jones, J., *concurring*)).

Similarly, the Seventh Circuit rejected a §2 claim that a district must be created with black voting-age populations between forty-three and forty-four percent: "[W]e cannot consider claims that . . . districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired." *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir.1988), *cert. denied*, 490 U.S. 1031 (1989).

In the Fifth Circuit, *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852-53 (CA5 1999), *cert. denied*, 528 U.S. 1114 (2000), held that vote dilution claimants are "required . . . to prove that their minority group exceeds 50% of the relevant population in [a potential] district." The Court affirmed a judgment against plaintiffs after finding that Hispanics could at most make up only 48.3% of a district's voting-age citizen population.

In the Ninth Circuit, *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n. 7 (CA9 1989), *overruled on other grounds*, *Townsend v. Holman Consulting*, 914 F.2d 1136 (CA9 1990), stated "we are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district." In *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (CA11 1997), the Eleventh Circuit held a §2 vote dilution claim cannot succeed when a protected group fails to comprise a majority of the citizen voting-age population.

In the District Courts, the Eastern District of Michigan has adopted the majority view, relying on *Cousin, supra. O'Lear v. Miller*, 22 F.Supp.2d 850, *summarily aff'd*, 537 U.S. 997 (2002). In *O'Lear*, plaintiffs asserted that the Michigan legislature's attempt to maintain the

territorial integrity of Wayne County (Detroit) had resulted in a "packing" of African-Americans in two districts inside of Wayne County. This claim was firmly rejected by the United States District Court. The Court held:

> . . . [M]inority voters cannot demonstrate that their numbers are sufficiently large and geographically compact to constitute a majority in a single-member district, other than in the two districts where they have "ample opportunity to elect black-preferred candidates."

O'Lear, supra, at 861.

But support for influence district claims can be found in District Court opinions. In *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D.Fla. 2002), the court held the first *Gingles* precondition, which requires that the protected group "constitute a majority", should not be construed as a literal, mathematical requirement. Instead, the court in *Martinez* held that the first *Gingles* precondition is satisfied so long as the district will "perform" for the protected group. *Id.* at 1321 n. 56.

In *Armour v. Ohio*, 775 F.Supp. 1044, 1059 n. 19 (N.D.Ohio 1991), the court drew a distinction between an "ability to elect" district and an "influence" district. In an "ability to elect" district, according to *Armour*, the minority group has the ability to elect a candidate of its choice irrespective of whether the minority group constitutes a majority of the voting population in the district. The three Judge panel in *Armour* recognized the validity of an influence claim under §2 of the Voting Rights Act.

In a case in which a Petition for a Writ of Certiorari was filed in this Court on September 15, 2003, *Parker v Ohio*, 263 F.Supp.2d 1100 (S.D.Ohio May 23, 2003), *petition for cert. filed*, 72 USLW 3193 (Sep. 15, 2003) (No. 03-411), the same issue is raised as in this Petition: does §2 recognize influence district claims?

In *Parker*, a three Judge panel of the United States District Court, Southern District of Ohio, Eastern Division, struggled with this issue. Two of the judges agreed with *Cousin* and *O'Lear*, and adopted the majority view finding no §2 violation in an influence district claim. But a concurring opinion disagreed on the recognition of influence dilution claims under §2. *Parker v. Ohio*, 263 F.Supp.2d 1100, 1109 (S.D.Ohio May 23, 2003) (Gwin, J., concurring).

As described in *Parker*, the plaintiffs claimed "that minority voters, specifically African-Americans, were precluded from achieving political efficacy by the new apportionment plan." *Id.* at 1102. The *Parker* Plaintiffs alleged that the Ohio apportionment plan "dilut[ed] the ability of Ohio's African Americans to elect candidates of their choice." *Id.* The Ohio plaintiffs in *Parker* were "seeking 'influence districts' and the prevention of influence-dilution."[4] *Id.* at 1104.

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[4] The *Parker* Court defines "influence district" as "one where a distinct group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected." *Parker*, *supra*, at 1104. This description is identical to Respondent's description of the districts at issue created by the 2001 Plan.

The *Parker* Court analyzed the plaintiffs' claim utilizing the three-pronged test articulated in *Gingles*. Utilizing the first *Gingles* factor as the touchstone, the Court focused on the fact that *no* "challenged district can be redrawn to constitute a majority/minority district. . . ." *Id.* at 1104.

The defendants in *Parker* argued that this fact, present in the challenged districts in Ohio and in the New Jersey districts challenged in this case, means that the *Parker* plaintiffs could never carry their burden. Plaintiffs could never prove the first *Gingles* factor. Plaintiffs could never prove that the minority populations "in the districts at issue are sufficiently large and geographically compact to constitute a majority." *Id.* at 1104. The plaintiffs countered by arguing, based on a footnote in *Uno v. City of Holyoke*, 72 F.3d 973, 979 n. 2 (1st Cir. 1995) that the first *Gingles* factor does not apply to "influence district" claims. *Id.*

> This precondition will have to be reconfigured to the extent that the courts eventually validate so-called influence dilution claims. *See Voinovich v. Quilter*, 507 U.S. 146, 156-160 (1993) (discussing treatment of claims brought on behalf of persons who constitute a potentially influential bloc, but less than the majority, within the relevant electorate, and raising [the] prospect that the first *Gingles* precondition may have to be "modified or eliminated"). The lower courts are divided on the subject, compare *Armour v. Ohio*, 775 F.Supp. 1044, 1052 (N.D.Ohio 1991) (three-judge panel) (recognizing influence dilution claim) with *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir.1988) (rejecting influence dilution claim), *cert. denied*, 490 U.S. 1031, (1989), and

> the Supreme Court has declined on four occasions to decide whether such claims are cognizable under VRA § 2. *See [Johnson v.] De Grandy*, 512 U.S. [997, 1008-9 (1994)]; *Voinovich*, 507 U.S. at 156-160; *Growe v. Emison*, 507 U.S. 25, 41 n. 5, *Gingles*, 478 U.S. at 46-47 n. 12.

The *Parker* court answered this argument as follows:

> While plaintiffs are correct that the First Circuit and the Supreme Court have not yet ruled on influence districts, we are bound by precedent in this circuit. In *Cousin v. Sundquist*, 145 F.3d 818, 828 (CA6 1998), the Sixth Circuit held, "[W]e do not feel that an 'influence' claim is permitted under the Voting Rights Act." *See also O'Lear v. Miller*, 222 F.Supp.2d 862 (E.D.Mich.2002). Because influence claims are not cognizable in our circuit and the plaintiffs have failed to establish the first *Gingles* precondition, we see no need to discuss whether or not plaintiffs satisfy the second and third preconditions. The plaintiffs' claim under Section 2 of the Voting Rights Act must fail.

Parker at 1105.

Judge Gwin concurred in the judgment, finding "plaintiffs' claims fail because they do not show that the White majority votes sufficiently as a block to enable it to usually defeat the minority-preferred candidate." *Id.* at 1109. But Judge Gwin disagreed with his brethren on the issue of whether or not influence district claims are cognizable under §2.

> The majority relies upon an interpretation of *Thornburg v. Gingles*, 478 U.S. 30 (1986) that requires minorities to constitute a majority of the voting population before bringing a claim under

> Section 2 of the Voting Rights Act ("the Act"), 42 U.S.C. § 1973(a). I believe such a holding is both unnecessary to the case before us and also likely wrong.

Id.

In the most recent District Court decision, *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003), the court rejected an influence district claim identical to the one accepted by the New Jersey Supreme Court in this case. In an opinion concisely tracing the history of the influence district dispute, *Hall, supra*, 276 F.Supp.2d at 532-536, Judge Morgan demonstrates that support for influence district claims is the minority view.

> The Plaintiffs correctly point out that the Supreme Court in *Gingles, Growe, Voinovich,* and *Johnson,* left open the issue of whether a vote dilution claim could be brought in an "influence district." It is reasonable to conclude that the issue remains similarly open on the question of whether a vote dilution claim may be brought in a "coalition district," since the Supreme Court has not addressed that particular question. All five Circuit Courts of Appeal that have considered the question of an "influence district" have held that the first precondition in *Gingles* establishes a bright line that precludes vote dilution claims in other than so called majority-minority districts. Two District Courts, however, have stepped across that bright line, and held that a vote dilution claim may be brought in a district where the protected group will not constitute a majority. *See Martinez v. Bush*, 234 F.Supp.2d 1275, 1321 n.56 (S.D.Fla. 2002); *Armour v. Ohio*, 775 F.Supp. 1044, 1050-52 (N.D.Ohio 1991) (it should be noted that *Armour's* interpretation of

> the first *Gingles* precondition pre-dated the Sixth Circuit's decision in *Cousin v. Sundquist*, 145 F.3d 818 (CA6 1998), *cert. denied*, 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999)). Neither the U.S. Court of Appeals for the Fourth Circuit nor any District Court in this Circuit have spoken to the issue of "coalition districts" or "influence districts," and the Plaintiffs have presented no argument which persuades this Court to deviate from what is clearly the majority rule.

Hall, supra, 276 F.Supp.2d at 538. The District Court succinctly describes why this should be so.

> Simply assessing whether a certain minority percentage will affect an electoral outcome would require courts to make, as then-Judge Stephen Breyer aptly noted in rejecting such a claim, "the very finest of political judgments about possibilities and effects – judgments well beyond their capacities." *Latino Political Action Comm. v. City of Boston*, 784 F.2d 409, 412 (CA1 1986). Members of any protected minority group could always launch a lawsuit to increase their presence in a district from 15 percent to 20 percent, or from 20 percent to 25 percent, and argue that this increase will cause their candidate to prevail. As the Seventh Circuit put it, "[c]ourts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil*, 851 F.2d at 947; *see also McGhee v. Granville County*, 860 F.2d 110, 116 (CA4 1988) (citing *McNeil* for proposition that first *Gingles* precondition is necessary to prevent vote dilution concept from being "an open-ended one subject to no principled means of application"); *Burton v. Sheheen*, 793

> F.Supp. 1329, 1350 (D.S.C.1992) (the *Gingles* preconditions shield "the courts from meritless claims"). "Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations." *Gingles v. Edmisten*, 590 F.Supp. 345, 381 (E.D.N.C.1984), *aff'd in part, rev'd in part, Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

Hall, supra, 276 F.Supp.2d at 536-537.

II. THE NEW JERSEY SUPREME COURT ADOPTED, INCORRECTLY, THE MINORITY VIEW

The Supreme Court of New Jersey has adopted the minority view, held that claims for influence districts are viable under §2 of the Voting Rights Act, and held that this viability prohibits enforcement of Article IV, §2, ¶3 of the New Jersey Constitution.

> "[U]npacking," or distributing the voting strength of minority groups not only into majority or safe districts but also into coalition or influence districts, is as much a tool of legislative apportionment, meeting the mandate of Section 2, as is "packing," or creating only safe majority districts. In our view, therefore, depriving the Commission of the "unpacking" tool would constitute an undue restraint on its reapportionment planning in contravention of the aims and policies of the Voting Rights Act.

McNeil v. Legislative Apportionment Commission, 177 N.J. 364, 384, 828 A.2d 840, 851-852 (2003) (App., *infra*, 18a-19a).

The New Jersey Supreme Court ignored the holding in *Parker*, and instead focused on Judge Gwin's concurring opinion. "We agree with Judge Gwin, a member of the Ohio Federal District Court three-judge panel that decided the *Parker* redistricting case, who stated:

> Most important, nothing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters. The Supreme Court has also suggested that a minority influence claim may be sufficient to sustain a Section 2 results claim. In *Chisom v. Roemer*, 501 U.S. 380[, 111 S.Ct. 2354, 115 L.Ed.2d 348] (1991), the Court stated that to establish a Section 2 claim, the plaintiffs must show both that they have less opportunity to participate in the political process and that they have less opportunity to elect representatives of their choice. Justice Scalia dissented, arguing that this reading of Section 2 would leave "minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis 'elect representatives of their choice'" entirely without Section 2 protection. *Id.* at 409, 111 S.Ct. at 2371, 115 L.Ed.2d at 372. He further reasoned that such minorities could therefore be denied equal opportunity to participate in the political process with impunity. *Id.* The majority responded to Justice Scalia's dissent by pointing out that his argument "rested on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Id.* at 397 n. 24[, 111 S.Ct. at 2365 n. 24, 115 L.Ed.2d at 364 n. 24]. Thus, the Court

> suggested that influence claims can be valid under Section 2 of the Act."

McNeil v. Legislative Apportionment Commission, 177 N.J. 364, 387, 828 A.2d 840, 853-854 (2003) (App., *infra*, 22a-23a), *citing Parker v. Ohio*, *supra*, 263 F.Supp.2d at 1113 (Gwin, J., concurring). If the New Jersey Supreme Court is correct, *Valdespino*, *Cousin*, *Nixon*, *McNeil*, *Romero*, *Townsend*, *O'Lear*, *Parker, and Hall* have been incorrectly decided and the correct approach is found in *Martinez*, *Armour,* and the dissent in *Parker*.

The New Jersey Supreme Court believed that to consolidate the "excess majority" voters, who had been spread out into influence districts, into existing majority-minority districts constituted "packing" in violation of §2 of the Voting Rights Act. In order to reach this result the New Jersey Supreme Court decided §2 applied to influence dilution claims. The Court recognized that "the Supreme Court [of the United States] has heretofore declined to decide whether an influence dilution claim is cognizable under the [Voting Rights Act] (VRA). . . . " But held that "we believe that *Georgia v. Ashcroft* supports our conclusion that such claims are permitted." *McNeil v. Legislative Apportionment Commission*, 177 N.J. at 386, 828 A.2d at 853 (App., *infra*, 21a).

There are three main flaws in the reasoning of the New Jersey Supreme Court: 1) the majority of the federal courts that have decided this issue have held influence dilution claims are not cognizable under §2 of the Voting Rights Act, *see, supra,* Point I; 2) this Court's decision in *Georgia v. Ashcroft* did not resolve the issue, and does not support the New Jersey Supreme Court's decision; and 3)

the creation of influence districts, logically, can never serve as a remedy for a §2 violation. *See, infra,* Point III.

Georgia v. Ashcroft, ___ U.S. ___, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003), decided June 26, 2003, held that a State's legislative redistricting plan cannot be denied preclearence under §5 of the Voting Rights Act simply because the plan creates influence districts, if the net effect of the plan does not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer v. United States,* 425 U.S. 130, 141 (1976)." *Georgia, supra,* at 2501. Thus, *Georgia* holds the creation of influence districts is one factor a court should consider in determining "the position of racial minorities with respect to their effective exercise of the electoral franchise" when preclearance is at stake under §5. *Id.* at 2510.

The New Jersey Supreme Court interpreted *Georgia* to mean that influence district claims are cognizable under §2 and that §2 ***required*** creation of the influence districts in the 2001 Plan, despite the clear mandate of the New Jersey Constitution.

> While we acknowledge that Section 5 of the VRA is not in issue here, we nevertheless think it plain that the methodology of creating election districts as described by Justice O'Connor in *Georgia v. Ashcroft* necessarily serves as the predicate of a state's obligation of compliance with Section 2(a). That is to say, "unpacking," or distributing the voting strength of minority groups not only into majority or safe districts but also into coalition or influence districts, is as much a tool of legislative apportionment, meeting the mandate of Section 2, as is "packing," or creating only safe majority districts. In our view,

> therefore, depriving the Commission of the "unpacking" tool would constitute an undue restraint on its reapportionment planning in contravention of the aims and policies of the VRA. We also think it plain that, because Newark and Jersey City constitute the largest municipal concentration of minority voters in this State, the two-district limitation of the State Constitution would deprive the Commission of the redistricting tool of "unpacking," a tool that is *now* recognized by the United States Supreme Court as one which the states *must* be free to employ if they deem it appropriate in order to protect and promote the electoral rights and interests of minority groups. (emphasis in the original)

McNeil v. Legislative Apportionment Commission, 177 N.J. at 386, 383-384, 828 A.2d at 851-852 (App., *infra*, 18a-19a).

The Supreme Court of New Jersey's analysis is incorrect. *Georgia* merely holds that the district court's failure to recognize a possible benefit from influence districts was a fatal flaw in the District Court's retrogression analysis under §5. *Georgia* at 2514-2517. The holding of *Georgia* does not support the 2001 Plan's creation of influence districts in violation of the New Jersey Constitution. *Georgia* held influence districts are relevant in a §5 inquiry; but this does not mean influence districts are required under §5, or §2.

Justice O'Connor's emphasis in *Georgia* is on the freedom states have in choosing how to redistrict. *Georgia* at 2511-2513. *Accord*, *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). *Georgia* holds, in a §5 context, that a State is free to create or not create influence districts.

§5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Thornburg v. Gingles*, *supra*, at 89 (O'Connor, J., concurring in judgment). *Georgia* at 2511-2512.

§5 leaves room for States to use these types of influence and coalitional districts. Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. *See Pitkin, supra*, at 142; *Swain, supra*, at 5. The State may choose, consistent with §5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters. *See Thornburg v. Gingles*, 478 U.S., at 87–89, 99 (O O'CONNOR, J., concurring in judgment); *cf. Johnson v. De Grandy*, 512 U.S., at 1020. *Georgia* at 2513.

On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, *see Voinovich v. Quilter*, 507 U.S. 146, 153-154 (1993), such a plan risks isolating minority voters from the rest of the state, and risks narrowing political influence to only a fraction of political districts. *Cf. Shaw v. Reno*, 509 U.S., at 648-650. *Georgia* at 2512.

Georgia does not alter prior §2 jurisprudence, as expressed in *Gingles*, *Voinovich* and their progeny. In fact, *Georgia* explicitly states that consolidation into a "smaller number of safe majority-minority districts" such as the New Jersey Constitution requires for Newark and Jersey City, is permissible.

Parker v. Ohio, 263 F.Supp.2d 1100 (S.D.Ohio May 23, 2003), *O'Lear v. Miller*, 222 F.Supp.2d 850, 860-861 (E.D.Mich. 2002), *summarily aff'd*, 537 U.S. 997 (2002), and *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003), all found consolidations, like the ones demanded by the New Jersey Constitution here, lawful, in the face of a §2 demand for influence districts.

> The practice challenged here, the creation of majority-minority districts, does not invariably minimize or maximize minority voting strength. . . . On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice.

Voinovich at 154-155. *Georgia* explicitly reaffirms this analysis when citing these pages.

III. INFLUENCE DISTRICTS ARE NEVER A REMEDY FOR A VOTING RIGHTS ACT VIOLATION

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court set out three threshold requirements that a plaintiff

must prove in order to invoke the protections of §2 of the Voting Rights Act in a redistricting context. If a plaintiff does not prove each and every one of the three "*Gingles* factors," the claim fails as a matter of law. *Id.* The Supreme Court in *Growe v. Emison*, 507 U.S. 25 (1993) applied the three part *Gingles* threshold test to single member districts stating that "[i]t would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote fragmentation challenge to a single member district. . . . " *Growe* at 40.

The third threshold requirement prohibits influence district claims under §2. This third precondition is:

> 3) the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51 (internal citations omitted). The Supreme Court in *Voinovich*, *supra*, held that the absence of the third *Gingles* factor, white bloc voting, precluded a finding of a §2 violation:

> [A]ppellees have failed to demonstrate *Gingles*' third precondition – sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F.Supp., at 700-701. *Accord*, *App. to Juris. Statement* 132a-134a, and n. 2, 139a-140a. Even appellees agree. *See* Tr. of Oral Arg. 25. Here, as in *Gingles*, **"in the absence of significant white bloc voting it cannot be said that the ability of minority**

> **voters to elect their chosen representatives is inferior to that of white voters."** *Gingles*, 478 U.S., at 49, n. 15, 106 S.Ct., at 2766, n. 15. The District Court's finding of a § 2 violation, therefore, must be reversed. (emphasis supplied)

Voinovich at 158[5]. In *Voinovich*, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S., at 49, n. 15.

Voinovich v. Quilter, 507 U.S. 146 (1993) creates a conundrum for any plaintiff who seeks to assert that the Voting Rights Act prefers districts in which the candidates of choice of the minority community cannot be elected without the support of substantial numbers of the white majority community, as opposed to districts in which the minority community has the ability to elect its candidates of choice, without substantial support from the white community. *Voinovich* essentially says that if the level of white support of candidates of the minority community's choice exists in an electoral district, such that minority candidates of choice can be elected without minority voting strength being above or at least near majority status, i.e. a so called "influence district;" then there can be no white bloc voting in that district and, therefore, the Voting Rights Act cannot be invoked either to require such a

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[5] In *Page v. Bartels*, 144 F.Supp.2d 346 (D.N.J. 2001) some of the same districts at issue here were challenged. Respondent Commission defended a §2 claim by persuading the Court that "[t]here is no evidence that the white majority in the challenged districts votes sufficiently as a bloc to enable it to defeat the minority's preferred candidates." *Page* at 362.

district, or to protect such a district. *Voinovich*, 507 U.S. at 153-157.

It is impossible to invoke the protections of §2 of the Voting Rights Act claiming vote dilution in any redistricting plan in the absence of white bloc voting. The third precondition cannot be met. There is no wrong in the absence of white bloc voting; therefore the Voting Rights Act requires no remedy. In the absence of white bloc voting, §2 of the Voting Rights Act does not require influence districts.

The obverse of this situation is if white bloc voting exists to such an extent that § 2 of the Voting Rights Act would apply. In the presence of white bloc voting, "influence districts" would not be an effective remedy because relatively high percentages of minority voting strength, approaching the fifty percent level, would be required in order to remedy the electoral situation created by the white bloc voting. When large numbers of white voters are not willing to support candidates of the minority communities' choice, the "influence" of an "influence district" is lost.

If a plaintiff is capable of asserting that sufficient white bloc voting exists so as to invoke the protections of the Voting Rights Act, then consolidation, as required by the New Jersey Constitution, is a superior remedy for the violation of the Act than are influence districts, like the ones created in the 2001 Plan. If white bloc voting exists in a particular district or districts, maintaining the territorial integrity of cities with majority-minority populations, such as Newark and Jersey City, enhances minority voting strength in those cities. Consolidation does not dilute minority voting strength in the face of white bloc voting.

Influence districts only work when the third *Gingles* precondition, white bloc voting, does not exist and white voters cross over and support the "influence" group's candidate of choice. But in the absence of this third precondition, the Voting Rights Act can never apply. Thus, logically, the Voting Rights Act can never apply to influence districts. The Voting Rights Act neither requires, nor prohibits, so called "influence" districts.

IV. THE ISSUE RAISED IN THIS PETITION IS SUBSTANTIAL

The issue raised in this Petition is the same issue raised throughout the country in each of the cited opinions: are influence district claims cognizable under §2 of the Voting Rights Act? The Petition in *Parker*, this Petition, and perhaps one to be filed in *Hall*, all present this same issue. It is an issue that is sure to continue to arise throughout the country.

If influence district claims are not cognizable under §2 of the Voting Rights Act, then the New Jersey Supreme Court has unnecessarily surrendered New Jersey's Constitutional provision on municipal boundaries to a non-existent claim under the Voting Rights Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-73 September Term 2002

ANNE M. MCNEIL,
THOMAS E. WILLIAMS,
ROSEANNA SIEBERT,
PAUL DIGAETANO and
KEVIN O'TOOLE,

Plaintiffs-Respondents,

v.

THE LEGISLATIVE APPORTIONMENT
COMMISSION OF THE
STATE OF NEW JERSEY,

Defendant-Appellant,

and

REGENA L. THOMAS,
Secretary of State of New Jersey
and PETER C. HARVEY,
Acting Attorney General of New Jersey,

Defendants-Respondents.

Argued April 28, 2003 – Decided July 31, 2003

On certification to the Superior Court, Appellate Division, whose opinion is reported at 357 *N.J. Super.* 74 (2003).

Sam Hirsch, a member of the District of Columbia and Maryland bars and *Leon J. Sokol* argued the cause for appellant (*Sokol, Behot and Fiorenzo, Scarinci & Hollenbeck* and *Genova Burns & Vernoia*, attorneys; *Mr. Hirsch* and *Paul M. Smith*, a member of the District of Columbia and Maryland bars, of counsel; *Mr. Sokol, Steven N. Siegel, Donald Scarinci, Robert E. Levy, Nomi*

Irene Lowy, *Angelo J. Genova*, *Celia S. Bosco* and *Laura H. Corvo*, on the briefs).

Allison E. Accurso, Assistant Attorney General, argued the cause for respondents Regena L. Thomas and Peter C. Harvey (*Peter C. Harvey*, Acting Attorney General of New Jersey, attorney; *Donna Kelly*, Senior Deputy Attorney General, on the letters in lieu of brief).

Kevin B. Riordan argued the cause for respondents Anne M. McNeil, Thomas E. Williams, Roseanna Siebert, Paul DiGaetano and Kevin O'Toole (*Berry, Sahradnik, Kotzas, Riordan & Benson*, attorneys).

Michael A. Armstrong submitted a brief on behalf of *amicus curiae* Black Ministers' Council of New Jersey (*Mr. Armstrong*, attorney; *Mr. Armstrong* and *Darrin Howard*, on the brief).

Lawrence S. Lustberg and *Shavar D. Jeffries* submitted a letter brief on behalf of *amicus curiae* New Jersey State Conference of Branches of the National Association for the Advancement for Colored People.

JoAnne Y. Watson, Corporation Counsel, submitted a letter in lieu of brief on behalf of *amicus curiae* City of Newark.

The opinion of the Court was delivered by COLEMAN, J.

No redistricting plan adopted in New Jersey since the inception of the "one person, one vote" doctrine in 1964 has conformed with our State Constitution's political boundary requirement for the State's two largest municipalities. Since that time, Newark and Jersey City have been divided into at least three districts each. The issue raised

in this appeal is whether the New Jersey Constitution's political boundary requirement now can be validly enforced with respect to Newark and Jersey City. We conclude that it may not without violating the Supremacy Clause.

I.

After every decennial United States Census, a bipartisan New Jersey Legislative Apportionment Commission (Commission) is created to redraw the forty Senate and Assembly districts and to apportion Senators and Assemblypersons among those districts. *N.J. Const.* art. IV, § 2, ¶1. The Commission consists of ten members, five members appointed by each State Committee for the two major political parties. *N.J. Const.*, art. IV, § 3, ¶1. On March 8, 2001, the Governor of New Jersey received the official report from the 2000 Census. The Commission has one month, following receipt of the census to certify by a majority of the Commission, a redistricting and reapportionment plan. Both the Republicans and the Democrats proposed separate plans containing three districts for Newark and Jersey City; neither plan received a majority vote.

Pursuant to Article IV, Section 3, Paragraph 2 of the New Jersey Constitution, when the Commission reached an impasse, Chief Justice Poritz appointed an independent eleventh member, Dr. Larry Bartels. Following that appointment, the Commission was allowed an additional month to redistrict and reapportion. *N.J. Const.* art. IV, § 3, ¶2. On April 11, 2001, the Commission adopted the Bartels plan, which was a modified version of the plan proposed by the Democrats. The vote was six to one; the

only dissent came from the one Republican member present for the vote. The plan divided Newark and Jersey City into three districts each. That plan divided Newark among the 27th, 28th and 29th districts and divided Jersey City among the 31st, 32nd and 33rd districts.

On the same day that the plan was filed with the New Jersey Secretary of State, the Republicans and others subject to the ripple effect of that plan, filed suit in the United States District Court for the District of New Jersey to block implementation of the plan. *Page v. Bartels*, 144 *F. Supp.* 2d 346, 349 (D.N.J. 2001). The *Page* plaintiffs alleged that the Commission's actions violated Section 2 of the Voting Rights Act of 1965 and plaintiffs' Due Process and Equal Protection rights under the Fourteenth and Fifteenth Amendments of the United States Constitution. *Id.* at 349-50. The plaintiffs argued that the Bartels plan would dilute the minority vote. *Id.* at 353. The Commission urged that the plan divided Newark and Jersey City into three districts, as had been the case for nearly four decades, to spread out black and Hispanic voters into a number of districts, *id.* at 353-54, a process commonly referred to as "unpacking." *See Robertson v. Bartels*, 148 *F. Supp.* 2d 443, 459 (D.N.J. 2001). The three-judge panel established pursuant to 28 *U.S.C.A.* § 2284[1] ruled in favor of the Commission. *Page, supra*, 144 *F. Supp.* 2d at 369.

Fifteen days after *Page* had been filed and was still pending, the Republicans brought a new challenge in

[1] Voting rights claims are heard by a statutory three-judge federal district court with a right of direct appeal to the Supreme Court. 28 *U.S.C.A.* § 1253 and § 2284.

federal court. *Robertson, supra*, 148 *F. Supp.* at 446. In that case, plaintiffs alleged that the 2001 plan resulted in unconstitutional racial gerrymandering in violation of the Fourteenth Amendment. *Ibid.* The *Page* court upheld the plan under the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments on May 7, 2001. *Page*, *supra*, 144 *F. Supp.* 2d at 369. Similarly, the *Robertson* court concluded on June 18, 2001, that the Bartels plan satisfied all applicable federal and state criteria for redistricting. *Robertson*, *supra*, 148 *F. Supp.* 2d at 458. The Supreme Court summarily affirmed that determination on January 22, 2002. 534 *U.S.* 1110, 122 *S. Ct.* 914, 151 *L. Ed.* 2d 881. The general election in 2001 and the primary election in 2003 were conducted under the Bartels plan.

The complaint in the present case was filed on May 9, 2001, alleging that because the Bartels plan carves Newark and Jersey City each into three legislative districts, it violates the plain language of Article IV, Section 2, Paragraph 3 of the New Jersey Constitution. That provision establishes the political boundary requirement for districts by providing that "[u]nless necessary to meet the [contiguity, compactness or equal population] requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the state. . . ." *Ibid.* Of the 566 municipalities in this State, Newark and Jersey City, the two largest, are the only ones whose political boundaries have been breached by the Bartels plan.

On cross-motions for summary judgment, the trial court ruled, among other things, that the Commission was not bound by the restrictions set forth in Article IV, Section 2, Paragraph 3. More particularly, the court held that the abrogation of the county-line mandate, announced first

in *Scrimminger v. Sherwin*, 60 *N.J.* 483 (1972), and subsequently reexamined and reaffirmed in *Davenport v. Apportionment Commission*, 65 *N.J.* 125 (1974), released the Commission from the necessity of adhering to the whole-municipality concept in cases of large municipalities such as Newark and Jersey City. The court, therefore, granted summary judgment to the Commission.

The Appellate Division reversed, declaring that the language of Article IV, Section 2, Paragraph 3 that requires dividing Newark and Jersey City into two districts never was invalidated under our prior case law but remains the starting point for legislative apportionment. The court, in effect, granted summary judgment in favor of plaintiffs, remanding the case to the Commission for creation of a redistricting plan that conforms with our Constitution. We granted the Commission's petition for certification, 176 *N.J.* 71 (2003), and stayed the Appellate Division judgment. We now reverse.

II.

A.

The analysis must begin with a historical review of Article IV, Section 2, Paragraph 3 of the New Jersey Constitution because, as Justice Oliver Wendell Holmes said, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 *U.S.* 345, 349, 41 *S. Ct.* 506, 507, 65 *L. Ed.* 2d 963, ___ (1921). Another famous jurist, Judge Learned Hand, teaches that literalism must be avoided because "[t]here is no surer way to misread any document than to read it literally." *Guiseppi v. Walling*, 144 *F.*2d 608, 624 (2d Cir. 1944) (Hand, J., concurring), *aff'd sub nom., Gemsco, Inc. v. Walling*, 324 *U.S.* 244, 65

S. Ct. 605, 89 *L. Ed.* 921 (1945). *See LaFage v. Jani*, 166 *N.J.* 412, 431 (2001) (citing *Jersey City Chapter Prop. Owner's Protective Ass'n v. City Council*, 55 *N.J.* 86, 100 (1969)). The history and evolution of our state constitutional provision pertinent to legislative reapportionment and redistricting are informative of our disposition of this case.

In 1962, *Baker v. Carr*, 369 *U.S.* 186, 200, 82 *S. Ct.* 691, 701, 7 *L. Ed.* 2d 663, __, held that federal courts have jurisdiction to decide whether a state apportionment plan for election to its legislature violates the Fourteenth Amendment. At the time *Baker* was decided, the 1947 New Jersey Constitution, Article IV, Section 2, Paragraphs 3 and 4, allocated at least one Senator and one Assemblyperson from each county regardless of population. *Jackman v. Bodine*, 78 *N.J. Super.* 414, 434 (Ch. Div. 1963). That prompted Christopher Jackman, a resident of West New York in Hudson County, and Winfield Chasmar, a resident of Verona in Essex County, to file a case in the Chancery Division claiming that the New Jersey Constitution violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 417. Then-Judge Pashman sitting in the Chancery Division rejected plaintiffs' claims. *Id.* at 434.

On direct appeal, this Court, after withholding its decision until a group of cases had been decided by the United States Supreme Court, including *Reynolds v. Sims*, 377 *U.S.* 533, 568, 84 *S. Ct.* 1362, 1385, 12 *L. Ed.* 2d 506, __ (1964) (establishing the "one person, one vote" principle), declared that the legislative article of our State Constitution was invalid. *Jackman v. Bodine*, 43 *N.J.* 453, 473 (1964) (*Bodine* I). The Court concluded that based on *Reynolds*, the Equal Protection Clause demands that in a

bicameral state legislature, such as New Jersey's, the seats of both houses must be apportioned substantially based on population. *Id.* at 458 (citing *Reynolds*, *supra*, 377 *U.S.* at 568, 84 *S. Ct.* at 1385, 12 *L. Ed.* 2d at 531). The Court made it clear that apportionment and districting should be accomplished through the legislative branch rather than the judicial branch because "the prescription of a [new legislative] plan of apportionment is laden with political controversy from which the judiciary cannot be too distant." *Id.* at 473.

Jackman v. Bodine, 43 *N.J.* 491, 493 (1964) (*Bodine* II), held that a resolution adopted by the Senate on November 16, 1964, following arguments in *Bodine* I, but nine days before the decision was rendered, providing for "weighted voting" was invalid. The Court reasoned that a single chamber of a bicameral legislature could not establish the procedure creating a new apportionment-districting plan. *Ibid.*

In *Jackman v. Bodine*, 44 *N.J.* 312, 315 (1965) (*Bodine* III), the President of the Senate sought permission of the Court to permit the November 1965 election to proceed under the legislative plan that had been invalidated in *Bodine* I. The Court rejected the request and required a statutory remedy pending a constitutional convention. *Id.* at 316. Thereafter, the Legislature adopted a plan for the temporary reapportionment of the Legislature, *L.* 1965, *c.* 19, codified as *N.J.S.A.* 52:10B-1 *et seq.*, repealed by *L.* 1979 *c.* 431, § 1, eff. Feb. 14, 1980, that "continued the present apportionment of the General Assembly and established an interim plan for the Senate." *Jackman v. Bodine*, 44 *N.J.* 414, 416 (1965) (*Bodine* IV). An application to invalidate that statutory plan was rejected because "[t]he pressing immediate need is to obtain a legislative

body substantially close to the demands of *Reynolds v. Sims*." *Id.* at 420-21. Therefore, the November 1965 election was conducted under a temporary statutory scheme rather than a constitutional provision.

At the general election held November 8, 1966, the voters of New Jersey adopted amendments to the New Jersey Constitution, including Article IV, Section 2, to correct the malapportioned Legislature condemned in *Reynolds* and *Bodine* I. Article IV, Section 2, Paragraph 1 provides that the Senate shall consist of forty members who would be apportioned among districts constructed based on proportionality of population. In addition, Article IV, Section 2, Paragraph 3 provides that the General Assembly shall consist of eighty members, two Assembly-persons for each Senator. The 1966 amendments were attacked in *Jackman v. Bodine*, 49 *N.J.* 406 (1967) (*Bodine* V). The *Bodine* V Court required some district lines to be altered in order to reduce population deviation. *Id.* at 415. The Court also held that, although population discrepancies between Assembly districts within each Senate district had to be corrected, the Commission need not recertify the Assembly districts until prior to the 1969 election. *Id.* at 419-20.

Following *Bodine* V, the Commission reconvened and prepared a new redistricting plan with respect to four counties. *Jackman v. Bodine*, 50 *N.J.* 127, 128 (1967) (*Bodine* VI). As a result of that modified redistricting plan, this Court was asked to intervene. *Ibid.* After the trial court upheld the Commission plan, this Court examined that redistricting plan and concluded that the adopted plan contained the smallest possible population deviation and that the districts sufficiently were compact to survive the challenge. *Id.* at 128-29. This Court concluded that

because there was insufficient time to remand to the Commission for additional consideration, the election should be conducted under the existing plan as had occurred in *Bodine* V. *Id.* at 129-30.

The Commission did not recertify a new legislative plan under the *Bodine* V and VI guidelines until April 1969. *Jackman v. Bodine*, 53 *N.J.* 585, 587 (1969), *cert. denied*, 396 *U.S.* 822, 90 *S. Ct.* 63, 24 *L. Ed.* 2d 73 (1969) (*Bodine* VII). The primary objection to the Commission plan was that recent United States Supreme Court cases, such as *Kirkpatrick v. Preisler*, 394 *U.S.* 526, 89 *S. Ct.* 1225, 22 *L. Ed.* 2d 519 (1969), and *Wells v. Rockefeller*, 394 *U.S.* 542, 89 *S. Ct.* 1234, 22 *L. Ed.* 2d 535 (1969), did not permit *any* population deviation to occur in order to comply with county or municipal boundaries. *Bodine* VII, *supra*, 53 *N.J.* at 587. This Court noted that *Reynolds* held that population deviations *may* occur when dealing with political subdivisions, and that *Kirkpatrick* and *Wells*, which dealt with congressional districting and not the apportionment of a state legislature, did not abandon that notion. *Id.* at 587-88 (citing *Reynolds*, *supra*, 377 *U.S.* at 580, 84 *S. Ct.* at 1391, 12 *L. Ed.* 2d at 538) (emphasis added). Significantly, *Bodine* VII recognized that "[i]t may, therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected." *Id.* at 588.

Subsequent to the November 1969 elections, the Court heard argument in respect of whether the apportionment plan could have adhered to the county, municipal, and ward lines in the State's two largest cities, Newark and Jersey City. *Bodine* VII, *supra* 53 *N.J.* 589. The Court held that because the Commission's recertified plan made

"modest" improvements and given the time constraints, the results were satisfactory for the 1969 elections. *Ibid.*

This Court decided the final *Jackman v. Bodine* case in 1970 and examined whether the redistricting plan under the New Jersey Constitution is compatible with federal requirements. 55 *N.J.* 371, 374 (*Bodine* VIII), *cert. denied*, 400 *U.S.* 849, 91 *S. Ct.* 39, 27 *L. Ed.* 2d 87. In examining precedents, the Court concluded that *Reynolds*, *supra*, 377 *U.S.* at 577, 84 *S. Ct.* at 1390, 12 *L. Ed.* 2d at ___, accepted districts as constitutional even though those districts may have departed from a strict numerical calculation of the one-person, one-vote principle. *Bodine* VIII, *supra*, 55 *N.J.* at 377-78. Therefore, *Bodine* VIII addressed departures from mathematical equality among districts and held that tolerances were still permissible under *Reynolds* because apportionment of a state legislature is different from redistricting for congressional elections. *Id.* at 378-79. In addressing the problem of gerrymandering and adherence to political subdivisions, the Court stated that "the use of existing county and municipal lines does not foreclose partisan selection of district lines, but it does limit that opportunity and does tend to make the political party responsible for the district plan more readily accountable at the polls." *Id.* at 379.

Two years after the final *Bodine* case was decided in 1970, this Court decided another case that addressed reapportionment of the State Legislature based on the one-person, one-vote doctrine. In *Scrimminger v. Sherwin*, *supra*, 60 *N.J.* at 495, the redistricting plan based on the 1970 census was found to be invalid. The issue presented was the constitutionality of dividing counties into two or more districts under *N.J. Const.* Article IV, Section 2, Paragraph 3. *Id.* at 486-87. New Jersey's twenty-one

counties contained substantial variations in population. *Id.* at 487. This Court held that the counties under the 1970 Census "cannot constitute separate districts. Nor are they suitable building blocks for the formation of meaningful districts." *Ibid.* It became clear that New Jersey's constitutional requirement mandating apportionment of the forty Senators among districts without exceeding permissible tolerances from mathematical equality conflicted with the mandate that each district "'shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.'" *Id.* at 488 (quoting *N.J. Const.* art. IV, §2, ¶1). The Court stated that, "[t]hus election by districts necessarily departs from the ideal of equality among voters." *Id.* at 490. The state constitutional requirement of adherence to county lines when redistricting was found to be unenforceable because when some counties elect one Senator and others elect multiple Senators, there is an inequality. *Id.* at 495-96. The Court further stated that although "[m]unicipalities are . . . appropriate building blocks for the creation of districts[,] [t]he boundaries of the larger municipalities will of course have to be breached, and in this regard, the Commission may have to depart from the direction in [Art. IV], §[2], ¶ 3, concerning the division of a municipality." *Id.* at 498.

Scrimminger also addressed the question "whether deviations from population equality among districts should be tolerated." *Id.* at 490. After examining the Supreme Court cases of *Connor v. Williams*, 404 *U.S.* 549, 92 *S. Ct.* 656, 30 *L. Ed.* 2d 704 (1972); *Whitcomb v. Chavis*, 403 *U.S.* 124, 91 *S. Ct.* 1858, 29 *L. Ed.* 2d 363 (1971); and *Abate v. Mundt*, 403 *U.S.* 182, 91 *S. Ct.* 1904, 29 *L. Ed.* 2d 399 (1971), the Court held that the apportionment plan

under consideration was invalid because it violated the permissible population deviation required to satisfy *Reynolds*. *Scrimminger*, *supra*, 60 *N.J.* at 492-95. Consequently, the matter was remanded to the Commission to prepare another plan. *Id.* at 498.

The new plan certified by the Commission formed the basis for challenges in *Davenport v. Apportionment Commission*, 63 *N.J.* 433 (1973) (*Davenport* I). The Court examined a number of recent federal cases and reaffirmed its holdings in *Scrimminger*. *Id.* at 446. The Court reserved on the issue whether "the Constitution commands that there shall be placed within *whole* counties as many of the 40 Senate districts as can be." *Id.* at 447-48.

The last time this Court addressed an apportionment issue was in *Davenport v. Apportionment Commission*, 65 *N.J.* 125 (1974) (*Davenport* II). Justice Sullivan began his opinion for the Court by stating that *Scrimminger* "held that Senate districts should be created without regard to the county-line theme of the State Constitution." *Id.* at 128-29. He stated that the holding was "bottomed on the United States Supreme Court decisions in *Whitcomb v. Chavis*, *Abate v. Mundt*, and *Connor v. Williams*, holding that substantial equality of population among legislative districts was the overriding object of the one-man, one-vote principle." *Id.* at 129 (citations omitted).

The Court also observed that the language of the last sentence in Article IV, Section 2, Paragraph 3 contemplates that when "dividing a multi-member Senate district into Assembly districts, the requirement of population equality may compel some division of larger counties and municipalities." *Davenport*, *supra*, 65 *N.J.* at 132. *Davenport* II also states that based on the 1970 census, *Scrimminger*

declared our "State constitutional mandate with respect to using counties" to determine the districting structure violated "the Federal Constitution under the one-man, one-vote principle." *Id.* at 132 (footnote omitted). *Davenport* II reaffirmed that principle and stated that "the county concept ceased to have any viability in the creation of Senate districts." *Id.* at 133. The *Davenport* II Court reemphasized "that population equality is distinctly paramount to [compactness] and that where districts are created on the basis of existing political subdivisions, compactness becomes a much reduced factor." *Id.* at 133-34 (citing *Bodine* V, *supra*, 49 *N.J.* at 419).

Finally, *Davenport* II acknowledged that the role of the judiciary in reviewing a redistricting plan is limited in that "[t]he judiciary is not justified in striking down a plan, otherwise valid, because a 'better' one, in its opinion, could be drawn." *Id.* at 135 (citing *Gaffney v. Cummings*, 412 *U.S.* 735, 753, 93 *S. Ct.* 2321, 2331, 37 *L. Ed.* 2d 298, 312 (1973)). The Court also concluded that Senate districts do not have to be placed in whole counties under any constitutional mandate. *Id.* at 132-33. "[W]e think it clear that attempting to preserve some semblance of county voting strength would create a plethora of constitutional problems." *Id.* at 133.

All of our state laws regarding apportionment for election to our State Legislature are subject to federal laws. Based on the Supremacy Clause, *U.S. Const.* art. VI, cl. 2, Article IV, Section 2, Paragraph 3 of the New Jersey Constitution dealing with legislative apportionment and redistricting, may not violate the federal Voting Rights Act, 42 *U.S.C.A.* § 1973, (VRA), that became effective August 6, 1965. Section 2 of the VRA provides:

§1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[42 *U.S.C.A.* § 1973.]

We therefore reaffirm this Court's pronouncements in *Bodine* VII, *Scrimminger*, and *Davenport* II that the literal language in our State Constitution with respect to political boundaries for counties and the two largest municipalities has to be breached based on the Supremacy Clause in

order to comply with the federal law. That has been the position of this Court since *Bodine* VII was decided in 1969, only three years after the 1966 constitutional amendments at issue here, and that position was reaffirmed in 1970 in *Scrimminger*. Consequently, the Law Division correctly concluded that the New Jersey Constitution's municipal boundary requirement, as interpreted by this Court for more than a quarter of a century, is not enforceable against Newark and Jersey City.

B.

We acknowledge that in *Bodine* VII, *Scrimminger*, and *Davenport* II the Court did not directly address the enforceability of the two-district limitation of our State Constitution. This is the first time since 1966 that that issue has been raised. We have concluded that the two-district limitation is unenforceable not only because of the principles we articulated in those opinions. There is yet another significant dimension of the Supremacy Clause compelling our conclusion that the Commission was justified in dividing Newark and Jersey City into more than two districts each despite the language of the New Jersey Constitution. The source of federal preemption lies not only in the federal constitutional mandate of one-person one-vote, but also in the VRA, which is designed to protect and advance the opportunity of minorities for full participation in the electoral process and their opportunity to elect representatives of their choosing. That principle has been made clearer recently by Justice O'Connor in *Georgia v. Ashcroft*, 539 *U.S.* ___, ___ *S. Ct.* ___, ___ *L. Ed.* 2d ___ (2003) (No. 02-182, 2003 WL 21467204, at *13 (U.S. June. 26, 2003)) in dealing with Section 5 of the VRA:

The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. [*See Thornburg v. Gingles*, 478 *U.S.* 30, 48-49, 87-89, 106 *S. Ct.* 2752, 2765, 2785, 92 *L. Ed.* 2d 25, __, __ (1986) (O'Connor, J., concurring in judgment).] Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice. [*See id.* at 88-89, 106 *S. Ct.* at 2786-87, 92 *L. Ed.* 2d at ___ (O'Connor, J., concurring in judgment)]; *cf.* Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 *N.C.L. Rev.* 1517 (2002).

Section 5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Thornburg v. Gingles*, *supra*,[478 *U.S.* at 89, 106 *S. Ct.* at 2786, 92 *L. Ed.* 2d at ___] (O'Connor, J., concurring in judgment). On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, *see Voinovich v. Quilter*, 507 *U.S.* 146, 153-154,[113

> *S. Ct.* 1149, 1155-56, 122 *L. Ed.* 2d 500, __] (1993), such a plan risks isolating minority voters from the rest of the state, and risks narrowing political influence to only a fraction of political districts. [*Cf. Shaw v. Reno*, 509 *U.S.* 630, 648-650, 113 *S. Ct.* 2816, 2827-28, 125 *L. Ed.* 2d 511, ___ (1993).] And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority voters in that district, the representation may be limited to fewer areas. *See* H. Pitkin, The Concept of Representation 60-91 (1967).
>
> On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. *See id.* at 114. It also, however, creates the risk that the minority group's preferred candidate may lose.
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> [*Georgia, supra*, 539 *U.S.* at ___, ___ *S. Ct.* at ___, ___ *L. Ed.* 2d at ___, 2003 WL 21467204, at *13.]

While we acknowledge that Section 5 of the VRA is not in issue here, we nevertheless think it plain that the methodology of creating election districts as described by Justice O'Connor in *Georgia v. Ashcroft* necessarily serves as the predicate of a state's obligation of compliance with Section 2(a). That is to say, "unpacking," or distributing the voting strength of minority groups not only into majority or safe districts but also into coalition or influence districts, is as much a tool of legislative apportionment,

meeting the mandate of Section 2, as is "packing," or creating only safe majority districts. In our view, therefore, depriving the Commission of the "unpacking" tool would constitute an undue restraint on its reapportionment planning in contravention of the aims and policies of the VRA. We also think it plain that, because Newark and Jersey City constitute the largest municipal concentration of minority voters in this State, the two-district limitation of the State Constitution would deprive the Commission of the redistricting tool of "unpacking," a tool that is *now* recognized by the United States Supreme Court as one which the states *must* be free to employ if they deem it appropriate in order to protect and promote the electoral rights and interests of minority groups.

The Commission here made a determination that the unpacking tool should be utilized. That plan is entitled to a presumption of validity. *Davenport* II, *supra*, 65 *N.J.* at 135. There can be no doubt that the Commission divided Newark and Jersey City into three districts, as it has done in the past, in order to achieve the salutary objective of unpacking by permitting the minority voters not only to elect representatives in safe districts but also by creating coalition and influence districts.

To now create two districts each in Newark and Jersey City would, in the Commission's view and supported by the record, constitute packing in violation of Section 2 of the VRA. Such a retrogressive redistricting plan would create "[d]ilution of racial minority group voting strength . . . caused by the dispersal of blacks [and Hispanics] into districts . . . where they constitute an excessive majority." *Thornburg v. Gingles*, *supra*, 478 *U.S.* at 46 n.11, 106 *S. Ct.* at 2764 n.11, 92 *L. Ed.* 2d at ___ n.11. Moreover, the federal court in *Page*, *supra*, 144 *F. Supp.* 2d at 366, has

already found that the Commission plan establishing three districts in both Newark and Jersey City did not involve vote dilution. Section 2(b) of the VRA permits consideration of "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision" in determining whether Section 2(a) has been violated. 42 *U.S.C.A.* § 1973(b). In the 2001 general election, minorities were elected to fill approximately sixty-one percent of the Senate and Assembly seats in the six districts comprising Newark and Jersey City. To now pack all of Newark and Jersey City residents into two districts each after nearly forty years of having three districts each, thereby reducing the Senators and Assemblypersons representing those two cities by one third, would violate the VRA. The effect of two districts would now "operate to *minimize* or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson*, 384 *U.S.* 73, 88, 86 *S. Ct.* 1286, 1294, 16 *L. Ed.* 2d 376, ___ (1966) (quoting *Fortson v. Dorsey*, 379 *U.S.* 433, 439, 85 *S. Ct.* 498, 501, 13 *L. Ed.* 2d 401, ___ (1965)); Voting Rights Act Extension, S. Rep. No. 97-417 at 23. Clearly, the attempt to reduce the number of districts in Newark and Jersey City from three to two is to minimize the chance of democratic control of the Legislature.

The demographics presented under the Bartels plan indicate that five of the six districts for Newark and Jersey City are minority-majority districts: 28th with 73.5% minorities, 29th with 79.8% minorities, 31st with 66.0% minorities, 32nd with 57.8% minorities and 33rd with 68.9% minorities. The 27th district is a minority-influence district with 44.8% minorities. Minority-majority districts are those in which minorities represent over fifty percent of the voting age population. An influence district exists

when minorities make up less than a majority of the voting-age population but the minorities nonetheless are able to elect preferred candidates when the group is large enough and cohesive enough to effectively influence elections. *Parker v. Ohio*, 2003 WL 21219404 at *3 (S.D. Ohio 2003). Because the ideal population for each of New Jersey's forty legislative districts under the 2000 census is 210,359, and because Newark's and Jersey City's populations exceed that ideal number by 63,187 and 29,696 respectively, *McNeil*, *supra*, 357 *N.J. Super.* at 80, limiting each of those municipalities to only two districts will, of necessity, reduce the number of minority-majority districts and/or the influence district.

Although the Supreme Court has heretofore declined to decide whether an influence dilution claim is cognizable under the VRA[2], we believe that *Georgia v. Ashcroft* supports our conclusion that such claims are permitted. After all, Congress enacted the VRA for the remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 *U.S.* 301, 315, 86 *S. Ct.* 803, 812, 15 *L. Ed.* 2d 769, __ (1966). The

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[2] In *Growe v. Emison*, 507 *U.S.* 25, 41, 113 *S. Ct.* 1075, 1084-85, 122 *L. Ed. 2d* 388, ___ (1993), the Court expressly declined to decide whether plaintiffs could argue influence dilution in addition to vote dilution when the *Gingles* test was not satisfied. Additionally, in *Voinovich*, *supra*, 507 *U.S.* at 154, 113 *S. Ct.* at 1155, 122 *L. Ed. 2d* at ___, the Supreme Court declined to address whether a reapportionment commission's failure to create influence districts resulted in a violation of Section 2 of the Voting Rights Act. A third case in which the Supreme Court avoided the issue of influence districts is *Johnson v. DeGrandy*, 512 *U.S.* 997, 1008-09, 114 *S. Ct.* 2647, 2656, 129 *L. Ed. 2d* 775, ___ (1994), where the Court declined to hold that plaintiffs could not make a Voting Rights Act claim based on influence districts.

VRA should be interpreted in a manner that provides "the broadest possible scope" in eliminating discrimination against minority voters. *Allen v. State Board of Elections*, 393 *U.S.* 544, 567, 89 *S. Ct.* 817, 832, 22 *L. Ed.* 2d 1, __ (1969). Those principles were reaffirmed recently when the Court restated that "[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. . . . [T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters." *Georgia v. Ashcroft*, *supra*, 539 *U.S.* at ___, ___ *S. Ct.* at ___, ___ *L. Ed.* 2d at ___, 2003 WL 21467204 at *18 (citations omitted). Influence dilution claims will hasten the time when race will not matter.

We agree with Judge Gwin, a member of the Ohio Federal District Court three-judge panel that decided the *Parker* redistricting case, who stated:

> Most important, nothing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters. The Supreme Court has also suggested that a minority influence claim may be sufficient to sustain a Section 2 results claim. In *Chisom v. Roemer*, 501 *U.S.* 380[, 111 *S. Ct.* 2354, 115 *L. Ed.* 2d 348] (1991), the Court stated that to establish a Section 2 claim, the plaintiffs must show both that they have less opportunity to participate in the political process and that they have less opportunity to elect representatives of their choice. Justice Scalia dissented, arguing that this reading of Section 2 would leave "minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis 'elect representatives of

> their choice'" entirely without Section 2 protection. *Id.* at 409. He further reasoned that such minorities could therefore be denied equal opportunity to participate in the political process with impunity. *Id.* The majority responded to Justice Scalia's dissent by pointing out that his argument "rested on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Id.* at 397 n.24. Thus, the Court suggested that influence claims can be valid under Section 2 of the Act.
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> [*Parker*, *supra*, 2003 WL 21219404 at *12 (Gwin, J., concurring).]

Additionally, one commentator in the Senate Report regarding Voting Rights Act violations asserted that influence dilution claims would be consistent with the purpose of the Voting Rights Act since "'[p]olitical effectiveness' . . . not only includes the power to elect, but also . . . the ability to use a group's voting strength to persuade candidates to address particular issues." Beth A. Levene, *Influence-Dilution Claims Under the Voting Rights Act.*, 1995 *U. Chi. Legal F.* 457, 468 (citing S.Rep. No. 97-417 (1982)). As noted previously, the Senate Report also asserts that the Voting Rights Act is violated when practices "'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" Levene, *supra*, 1995 *U. Chi. Legal F.* at 467 (quoting S. Rep. No. 97-417 at 23, 28 (1982)).

Another commentator has stated:

> Indeed, §2 refers to open participation for minority voters in the "political processes leading to nomination or election" as well as the opportunity "to elect representatives of their choice." Thus, political participation includes lobbying

> and coalition building in the electoral process (as well as voting) to influence an electoral outcome when a majority-minority district cannot be drawn.
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> . . . [V]ote dilution and influence dilution are very much intertwined. . . . A reapportionment plan might "pack" minority voters into single-member districts to prevent them from asserting influence in surrounding districts. Such "packing" occurs when the minority-preferred candidate in the majority-minority district receives excessively more votes than needed to carry the election. An influence district would serve to capture those excess votes to assert minority influence in another district.
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> [Stanley Pierre-Louis, *The Politics of Influence: Recognizing Influence Dilution Claims Under § 2 of the Voting Rights Act*, 62 *U. Chi. L. Rev.* 1215, 1224 (1995) (quoting 42 *U.S.C.A.* § 1973 (b)).]

If the Bartels plan is altered such that Newark and Jersey City residents are placed in only two legislative districts each, that will result in vote dilution and therefore will violate the VRA. The Supremacy Clause interdicts that result.

III.

A.

Although we rest our decision on the Supremacy Clause, we nevertheless point to other well-accepted doctrines in our jurisprudence that would lead to the same result. First, is the doctrine of contemporaneous construction. Since Article IV, Section 2, Paragraph 3 was added to our State Constitution in 1966, Newark and Jersey City

have been divided into at least three districts. The issue in the past has been where to draw the district lines for each of the three or more districts for Newark and Jersey City and not whether there should be only two districts in each municipality. Based on the decisional law, and the long-standing, unchallenged history of certifying redistricting plans that divided Newark and Jersey City into three or more districts notwithstanding our State Constitution's political boundary requirements, we find the doctrine of contemporaneous and practical construction to be applicable.

New Jersey courts first utilized the century-old doctrine of contemporaneous and practical construction in a limited manner, only applying the doctrine "'to illustrate and confirm the text [of a constitutional provision], to explain a doubtful phrase[,] or to expound an obscure clause.'" *State v. Wrightson*, 56 *N.J.L.* 126, 206 (Sup. Ct. 1893) (quoting 1 *Story, Const.*, §§ 405, 407). In *Wrightson*, the Court was required to consider "[h]ow far contemporaneous exposition, long usage[,] and [especially the] practical interpretation shall control in the construction of [the challenged] constitutional provisions. . . ." *Ibid.* The Court commented:

> Contemporaneous construction and long usage, and especially the practical interpretation by the various departments of the government, are entitled to great weight in the construction of constitutional provisions. But it is only when the words of the constitution are of doubtful significance, or the meaning is obscure, that resort to extraneous aid is permissible.
>
> [*Ibid.*]

Although the Court in *Wrightson* recognized the doctrine of contemporaneous and practical construction, it held that the doctrine did not apply in that case where contemporaneous construction of the constitutional provision involved there conflicted with the clear (overall) constitutional mandate. *Id.* at 213-14.

As time progressed, the Court applied the doctrine of contemporaneous and practical construction to our State Constitution. In *In re Hudson County*, 106 *N.J.L.* 62, 64-66, 76-78 (E. & A. 1928), the doctrine of contemporaneous construction was used to determine whether the Court properly had assembled for the purpose of hearing an appeal during which the members sat en banc and decided the case. The Court commented:

> Said Chief Justice Gummere, speaking for this court in *Commonwealth Roofing Co. v. Riccio*, 81 *N.J. Eq.* 486, [488-89 (E. & A. 1913)]: "[W]henever there is a debatable question as to the proper construction of a statutory provision, the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the courts as the true one." [(citations omitted)]. And this applies generally to the construction of the constitution.
>
> In *State v. Kelsey*, [44 *N.J.L.* 1, 21-22 (Sup. Ct. 1882), Chief Justice Beasley stated]: "Under this condition of affairs, as this case is to be tried by the court upon the merits as well as the law, this court is obliged to find, and does find, as a matter of fact, that the legislation in question has received a practical construction to the effect stated for a period of time in excess of fifty years.

> Therefore, to consider the question as to the proper meaning of that legislation as an open one, would . . . be utterly opposed to public policy, precedent and the admitted principles of law.
>
> The legal rule is succinctly expressed in the maxim of the civil law, '*contemporanea expositio est fortissima.*' The doctrine has such prevalence that it is applicable not only in the exposition of statutes, but in the interpretation of constitutions of government. Its antiquity with respect to the English law is evidenced by the comment of Lord Coke, who says: 'Great regard ought, in construing a statute, to be paid to the construction which the sages of the law who lived about the time, or soon after, it was made, put upon it, because they were best able to judge of the intention of the makers at the time the law was made.'"
>
> [*Id.* at 75.]

In *Lloyd v. Vermeulen*, 22 *N.J.* 200 (1956), the Court "recognize[d] fully that resort may be had to contemporaneous and practical constructions for whatever aid they may fairly afford in ascertaining the true sense and meaning of constitutional and statutory provisions." *Id.* at 210. The Court referred to Justice Heher's remarks in *In re Roche's Estate*, 16 *N.J.* 579, 587 (1954), "that '[t]he meaning of [an enactment] is not ruled by [its] strict letter, but rather by the sense and meaning fairly deducible from the context,'" and in *Caputo v. The Best Foods, Inc.*, 17 *N.J.* 259, 264 (1955), "that the lawgivers' intention 'emerges from the spirit and policy of the statute rather than the literal sense of particular terms.'" *Lloyd*, *supra*, 22 *N.J.* at 205-06. Those principles were reaffirmed in

New Jersey Assoc. on Correction v. Lan, 80 *N.J.* 199, 215 (1979).

Recently, the Court has rejected a literal reading of a statutory amendment in "favor [of] a narrower and more practical construction" consistent with the amendment's intended meaning. *State v. Trump Hotels & Casino Resorts, Inc.*, 160 *N.J.* 505, 527-29 (1999); *see also State v. Trump Hotels & Casino Resorts, Inc.*, 314 *N.J. Super.* 651, 661 (Law Div. 1997) (stating "in the words of Judge Learned Hand, 'there is no surer way to misread any document than to read it literally'") (citing *Lloyd*, *supra*, 22 *N.J.* at 205), *aff'd*, 314 *N.J. Super.* 536 (App. Div. 1998), *aff'd*, 160 *N.J.* 505 (1999) (citation omitted)). The Court relied on the legislative history and the contemporaneous and practical construction of the amendment that had gone unchallenged for approximately twenty years, to ascertain the intent and proper construction of the legislation. *Trump Hotels*, *supra*, 160 *N.J.* 527-29; *Trump Hotels*, *supra*, 314 *N.J. Super.* at 661, 672; *Atlantic City Racing Ass'n v. Attorney General*, 98 *N.J.* 535, 548 (1985); *Lan*, *supra*, 80 *N.J.* at 215; *Lloyd*, *supra*, 22 *N.J.* at 206; *In re Hudson County*, *supra*, 106 *N.J.L.* at 75. The trial court in *Trump Hotels* concluded that "where contemporaneous and practical interpretation has stood unchallenged for a considerable period of time, such may be regarded as of great importance in arriving at a proper construction of a statute or constitutional provision." *Trump Hotels*, *supra*, 314 *N.J. Super.* at 662 (citations omitted).

The doctrine holds that when construing a constitutional provision, the long and unchallenged usage and practical interpretation by those charged with implementation, enforcement, and administration of the provision will prevail over the strict construction of the provision

when there is good reason to question the viability and continued validity of that provision. *See State v. Trump*, *supra*, 160 *N.J.* at 527-29; *cf. Cedar Cove, Inc. v. Stanzione*, 122 *N.J.* 202, 212 (1991) (discussing contemporaneous construction of legislation by administrative agencies). After this Court's decisions in *Bodine* VII, *Scrimminger*, and *Davenport* II, the only ambiguity remaining in the literal language of Article IV, Section 2, Paragraph 3 of the New Jersey Constitution was whether the municipal boundaries of the 564 municipalities that are smaller than Newark and Jersey City would have to be breached when redistricting. That issue is not presented in this case and should not be addressed. Even if some ambiguity existed in respect of whether the municipal boundaries of Newark and Jersey City had to be breached, such ambiguity is a proper predicate for the application of the contemporaneous construction doctrine.

Application of that doctrine to the present case would support the conclusion that the common and unanimously agreed-upon understanding of this Court, and the legal and political communities of this State as well, is that the two-district limitation for Newark and Jersey City must be ignored. The municipal boundary requirement for Newark and Jersey City has been silently superceded by this Court for more than a quarter of a century in order to preserve the one-person, one-vote mandate. This Court must continue to depart from the narrow interpretation of the challenged constitutional provision in favor of a contemporaneous and practical construction of the language. For nearly forty years, the division of Newark and Jersey City into three or more districts has gone unquestioned. Once the boundaries of Newark and Jersey City are disregarded, the question is whether they need to be observed

in any particular way, *i.e.* as two-district maximums. Our view is that *Bodine* VII, *Scrimminger*, and *Davenport* II so discredited the constitutional scheme that once the apportioners were freed, by reason of the size of Newark and Jersey City, from the municipal-boundary preservation, they *reasonably* regarded themselves as free to apply well-accepted general apportionment principles, not the two-district limitation, to those cities. Given the totality of the circumstances, that decision was entirely justified by what had to be a legitimate question as to how much of the constitutional dictate continued to apply after *Bodine* VII, *Scrimminger*, and *Davenport* II. When the decision of the Commission is viewed within the framework of the contemporaneous and practical construction doctrine, and the totality of the circumstances as required by the VRA, it becomes clear that to construe strictly the language of Article IV, Section 2, Paragraph 3 would result in inequalities due to the packing of minorities into fewer districts. Packing, in turn, would dilute minorities' ability to elect representatives of their choice and thus would violate Section 2 of the VRA. Under the Supremacy Clause, the New Jersey State Constitution must yield to federal law.

B.

In addition to the contemporaneous construction, the doctrine of claim preclusion also would lead us to the striking of the complaint.

"[R]edistricting differs from other kinds of state decision-making in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*,

supra, 509 *U.S.* at 646, 113 *S. Ct.* at 2826, 125 *L. Ed.* 2d at ___. The reapportionment process has traditionally involved political accommodation of competing interests of "political, religious, ethnic, racial, occupational and socio-economic groups." *Davis v. Bandemer*, 478 *U.S.* 109, 147, 106 *S. Ct.* 2797, 2818, 92 *L. Ed.* 2d 85, ___ (1986) (O'Connor, J., concurring). Consequently, "the apportionment task is primarily a political and legislative process and [ ] districting inevitably has and is intended to have substantial political consequences." *Davenport* II, *supra*, 65 *N.J.* at 134.

"The judiciary is not justified in striking down a plan, otherwise valid, because a 'better' one, in its opinion, could be drawn." *Id.* at 135 (citing *Gaffney*, *supra*, 412 *U.S.* at 753-54, 93 *S. Ct.* at 2332, 37 *L. Ed.* 2d at ___). That is essentially what happened in the Appellate Division. The appellate panel struck down the Commission plan because the Commission's plan divided Newark and Jersey City into three districts. The effect of the Appellate Division's holding, is essentially an

> attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of [two] political . . . groups. Even if . . . such claims [were limited] to organized political parties, the fact remains that the losing party or the losing group of legislators in every reapportionment will . . . be invited to fight the battle anew in federal court."
>
> [*Davis*, *supra*, 478 *U.S.* at 147, 106 *S. Ct.* at 2818, 92 *L. Ed.* 2d at ___ (O'Connor, J., concurring).]

We believe, therefore, that the present litigation could have been terminated based on the claim preclusion doctrine and the virtual representation rule.

The genesis of the claim preclusion doctrine predates our 1947 Constitution. As early as 1933, the highest Court in this State declared that "[n]o principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon." *Smith v. Red Top Taxicab Corp.*, 111 *N.J.L.* 439, 440-41 (E. & A. 1933). That concept was incorporated into the Judicial Article of the 1947 Constitution. It provides:

> Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined.
>
> [*N.J. Const.* art. VI, § 3, ¶ 4.]

Seven years after adopting the 1947 Constitution, and twelve years before adopting the constitutional amendment involved in this appeal, this Court observed that the Judicial Article and implementing Court Rules adopted by this Court were intended to provide "a simple and flexible procedural framework designed and purposed for the just and expeditious determination in a *single action* of the ultimate merits of an entire controversy between litigants." *Ajamian v. Schlanger*, 14 *N.J.* 483, 485 (1954) (emphasis added). To implement that constitutional provision, our courts have held that "a party who has elected to hold back from the first proceeding a related

component of the controversy [will] be barred from thereafter raising it in a subsequent proceeding." *Wm. Blanchard Co. v. Beach Concrete Co.*, 150 *N.J. Super.* 277, 292-93 (App. Div.), *certif. denied*, 75 *N.J.* 528 (1977).

The concept that a party is required to bring all possible claims in one proceeding is embodied in the closely linked concepts of *res judicata* and the entire controversy doctrine. *See Long v. Lewis*, 318 *N.J. Super.* 449, 459 (App. Div. 1999) ("The claim preclusion aspect of the entire controversy doctrine is essentially *res judicata* by another name."). Under both federal law and this State's law, claim preclusion requires that

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
>
> [*Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 *N.J.* 398, 412 (1991) (citations omitted).]

"Claim preclusion applies not only to matters actually determined in an earlier action, but to all relevant matters that could have been so determined." *Ibid.* (citing *Angel v. Bullington*, 330 *U.S.* 183, 192-93, 67 *S. Ct.* 657, 662, 91 *L. Ed.* 832, 838-39 (1947); *Culver v. Insurance Co. of N. Am.*, 115 *N.J.* 451, 463 (1989)).

> [C]auses of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence. If, under various theories, a litigant seeks to remedy a single wrong, then that litigant should present all theories in the

> first action. Otherwise, theories not raised will be precluded in a later action."
>
> [*Id.* at 413 (citations omitted); *see Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 142 *N.J.* 336, 338 (1995); *Giudice v. Drew Chemical Corp.*, 210 *N.J. Super.* 32, 41-42 (App. Div. 1986).]

It does not matter whether the two claims were filed in two different forums. *Blazer Corp. v. New Jersey Sports & Exposition Auth.*, 199 *N.J. Super.* 107, 112 (App. Div. 1985).

Republican legislators and voters twice have challenged the Bartels redistricting plan in the federal district court, which has twice rejected their claims. *Page*, *supra*, 144 *F. Supp.* 2d at 346; *Robertson*, *supra*, 148 *F. Supp.* 2d at 443, *summarily aff'd*, 534 *U.S.* 1110, 122 *S. Ct.* 914, 151 *L. Ed.* 2d 881 (2001). The plaintiffs in *Page* who filed their complaint on April 12, 2001, were African-American and Hispanic voters from districts that included Newark and Jersey City, and the Republican majority in the New Jersey Senate and General Assembly. *Page*, *supra*, 144 *F. Supp.* 2d at 349-50 & n.3. They sought to prevent implementation of the Bartels plan because it allegedly violated Section 2 of the VRA, their rights to Due Process and Equal Protection under the 14th Amendment, and their rights under the 15th Amendment by diluting the minority vote. *Id.* at 349-50, 353. The court upheld the plan on May 7, 2001. *Id.* at 369.

Republican elected officials and two individuals seeking election filed a separate challenge to the Bartels plan on April 27, 2001. *Robertson*, *supra*, 148 *F. Supp.* 2d at 446. Two of the seven *Robertson* plaintiffs, one Senator

and one Assemblyman, were also plaintiffs in the *Page* litigation. Although neither the entire group of plaintiffs nor the claims in *Robertson* were identical to those in *Page*, the court granted the Commission's motion for summary judgment based on the doctrine of *res judicata*. *Id.* at 452-53. The court recognized that plaintiffs shared "a clear commonality of interests" and all stood to benefit if the plan were declared invalid. *Id.* at 451. The court also found that the *Robertson* plaintiffs "engaged in tactical maneuvering" to file their own claim rather than joining the *Page* litigation. *Id.* at 451-52. Also, because the ultimate goal of the *Page* and *Robertson* plaintiffs was the same, the court held that the *Robertson* plaintiffs received adequate representation from the *Page* plaintiffs notwithstanding the fact that the two groups used different arguments with respect to whether the redistricting plan violated the VRA and the Constitution. *Id.* at 452. Finally, the court noted its concern that the issue of racial gerrymandering in redistricting "could 'assume immortality,'" and held that there was privity between the *Page* and *Robertson* plaintiffs. *Id.* at 452-53 (citation omitted).

Significantly, the court interpreted the *res judicata* test broadly because the issue implicated public rather than private rights. *Id.* at 450, 452. Because each plaintiff in a public law case has an indirect interest in the outcome, "due process concerns are lessened[.]" *Id.* at 450 (citing *Richards v. Jefferson County*, 517 *U.S.* 793, 803, 116 *S. Ct.* 1761, 1768, 135 *L. Ed.* 2d 76, ___ (1996)). "Additionally, because of the potentially large number of plaintiffs with standing in public law cases, were they allowed to raise issues continually, public law claims 'would assume immortality.'" *Ibid.* (quoting *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 *F.* 2d 731,

741 (9th Cir. 1984)). Courts therefore have "'wide latitude'" to use claim preclusion in public law cases such as this one. *Ibid.* (citation omitted).

The *McNeil* plaintiffs assert in their state-law claim that anything except a two-district plan for Newark and Jersey City would violate Article IV, Section 2, Paragraph 3 of the New Jersey Constitution. We also could preclude plaintiffs from proceeding with this litigation based on the doctrine of *res judicata*. First, the *McNeil* plaintiffs seek essentially the same remedy as the *Page* plaintiffs – invalidation of the Bartels redistricting plan. As the federal court in *Robertson* recognized, such suits that seek identical relief through alternate means "arise from the same transaction" for claim preclusion purposes. *Robertson*, *supra*, 148 *F. Supp.* 2d at 448-49. Second, the *McNeil* plaintiffs either took part in *Page* or were in privity with the *Page* plaintiffs. Although the *Page* and *McNeil* plaintiffs offer different theories in respect of why the redistricting plan is unlawful (one group using the federal and one using the State Constitution), it is clear that both seek the same remedy. *See Robertson*, *supra*, 148 *F. Supp.* 2d at 451 (finding that privity existed between the *Page* and *Robertson* plaintiffs pursuant to the doctrine of virtual representation).

Furthermore, legally there has been a final decision on the merits respecting the *McNeil* plaintiffs' claim because their state constitutional claim should have been raised in the federal proceeding pursuant to the doctrine of pendent jurisdiction. *Reid v. Reid*, 310 *N.J. Super.* 12, 23-24 (App. Div. 1998) ("'[I]f a federal court in a prior action would have exercised pendent jurisdiction over related state claims that were not asserted, a final judgment on the merits by the federal court precludes raising those

claims in a subsequent action in state court.'" (quoting *Watkins v. Resorts Int'l Hotel & Casino*, 124 *N.J.* 398, 413 (1991)); *Ferger v. Local 483 of the Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 94 *N.J. Super.* 554, 564 (Ch. Div. 1967) (holding that, where defendant failed to raise defense of plaintiff's fraud in federal court, defendant is barred from "raising that issue" in state court). The doctrine of pendent jurisdiction is now called supplemental jurisdiction. 28 *U.S.C.A.* § 1367; *Raygor v. Regents of the Univ. of Minn.*, 534 *U.S.* 533, 539-40, 122 *S. Ct.* 999, 1004, 152 *L. Ed.* 2d 27, ___ (2002).

Federal courts have exercised supplemental jurisdiction over state law claims that "derive from a common nucleus of operative fact" with a federal claim. *United Mine Workers v. Gibbs*, 383 *U.S.* 715, 725, 86 *S. Ct.* 1130, 1138, 16 *L. Ed.* 2d 218, ___ (1966). In this case, plaintiffs' state law claim that the redistricting plan violates the New Jersey Constitution "derive[s] from a common nucleus of operative fact" with the Equal Protection claim raised in federal court: both challenges involve the Bartels plan's unique effect on the State's two largest municipalities, which have a high concentration of minority voters. *Baker v. Carr*, *supra*, 396 *U.S.* at 199-200, 82 *S. Ct.* at 700-01, 7 *L. Ed.* 2d at ___, made clear that federal courts have jurisdiction to decide the constitutionality of state apportionment plans for state legislative elections. We are persuaded that the federal court would have exercised jurisdiction over plaintiff's state constitutional claim because the packing of minority voters into two districts after nearly a forty-year history of having three districts each implicates Section 2 of the federal Voting Rights Act of 1965. It is highly likely that the federal court would have exercised supplemental jurisdiction over the state

law claim in order to resolve the entire redistricting controversy at once. *See Gibbs*, *supra*, 383 *U.S.* at 726, 86 *S. Ct.* at 1139, 16 *L. Ed.* 2d at ___ ("[The] justification [for supplemental jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants. . . . ") Therefore, this state court action should be precluded. *Reid*, *supra*, 310 *N.J. Super.* at 23-24.

Finally, although defendants did not explicitly raise *res judicata* as a defense, the Commission's brief impliedly raised the issue when it stated that this is the fourth case in which plaintiffs have attacked the Commission plan. That brief, however, cites none of the relevant cases. Although *res judicata* is an affirmative defense that may be deemed waived if not asserted, *R.* 4:5-4; *Brown v. Brown*, 208 *N.J. Super.* 372, 384 (App. Div. 1986), the pleading requirement is not absolute. It may be disregarded for public policy reasons or in the interest of substantial justice. Pressler, *Current N.J. Court Rules*, comment 1 on *R.* 4:5-4 (2003). Moreover, affirmative defenses have been permitted to be raised either *sua sponte* or untimely by a party when the interests of justice or public policy were at stake. *See, e.g., Douglas v. Harris*, 35 *N.J.* 270, 281-82 (1961) (contributory negligence); *Jackson v. Hankinson*, 94 *N.J. Super.* 505, 513-14 (App. Div. 1967) (governmental immunity raised *sua sponte*).

This case cries out for the *sua sponte* application of *res judicata*. The *McNeil* plaintiffs filed their complaint in state court on May 9, 2001, insisting that Newark and Jersey City each should be limited to two districts only two days after their privities in *Page* had argued unsuccessfully that each of those municipalities should have three districts, but that the district lines drawn by the Commission should be changed. There is an infinite number of

plaintiffs who could be enlisted by either political party to contest this or future redistricting plans. The philosophy that undergirds *res judicata*, which elevates the needs of the public over the litigation choices of the parties, supports this approach. As the courts of this State have observed:

> The doctrine of *res judicata* is primarily one of public policy and only secondarily of private benefit to individual litigants. . . . [I]ts roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammeled opportunity of presenting all of the facts pertinent to the controversy. The primary object of *res judicata* (public policy) is based upon the maxim *reipublicae ut sit finis litium* – it concerns the commonwealth that there be a limit to litigation. [(citations omitted).]
>
> [*Kugler v. Romain*, 110 *N.J. Super.* 470, 484 (Ch. Div. 1970) (quoting *Desmond v. Kramer*, 96 *N.J. Super.* 96, 107 (Cty. Ct. 1967) (quoting *Coca-Cola v. Pepsi-Cola Co.*, 172 *A.* 260 (Del. 1934)))].

The voters and duly-elected legislators from the six districts that include Newark and Jersey City under the Commission plan deserve an end to this litigation. By rewarding the *McNeil* plaintiffs for their use of different litigation strategies than those used by their privities in federal court, this Court would be assisting all aggrieved political organizations and voters to challenge redistricting plans with a never-ending stream of plaintiffs, a giant step toward the *Robertson* court's fear that McNeil-like cases could achieve immortality. The virtual representation rule could be applied to preclude multiple litigation of the same

or similar issues previously raised or should have been raised in prior proceedings.

IV.

The judgment of the Appellate Division is reversed; the judgment of the Law Division dismissing the complaint is reinstated.

JUSTICES LONG and ZAZZALI and JUDGE PRESSLER (t/a) join in JUSTICE COLEMAN's opinion. JUSTICES VERNIERO and ALBIN filed a joint dissenting opinion. JUSTICE LaVECCHIA filed a separate, dissenting opinion. CHIEF JUSTICE PORITZ did not participate.

VERNIERO, ALBIN, JJ., dissenting.

Pursuant to Article IV, section 2 of the New Jersey Constitution, Newark and Jersey City can be divided into no more than two State legislative districts each. The majority declares that following that constitutional mandate would violate the federal Voting Rights Act (VRA) and, on that basis, upholds the current legislative apportionment map. We cannot determine whether the majority's position is correct based on the present record. We thus would remand this matter to the Law Division, giving the current map a presumption of validity. We would allow the challengers the opportunity to demonstrate, with substantial certainty, whether an alternative apportionment plan can pass muster under federal law consistent with the New Jersey Constitution.

We do not accept the majority's conclusion that past departures from Article IV, section 2, paragraph 3 effectively

have written that provision out of the State's constitution. The cases that arguably support the Court's holding were decided under circumstances not present here. Accordingly, we would not import the rationale of those decisions to this case. Simply put, Article IV, section 2 of our State's constitution remains in effect and need only yield to superior federal voting-rights principles. The recently-decided *Georgia v. Ashcroft*, ___ *U.S.* ____, 123 *S. Ct.* 2498, ___ *L. Ed.* 2d ___ (2003), addresses a section of the VRA that is not implicated in this case. Accordingly, *Ashcroft* does not resolve the issues before us.

Contrary to the Appellate Division, we also are not prepared at this juncture to hold that Article IV, section 2 invalidates the Commission's 2001 plan, which otherwise is presumed valid. *Davenport v. Apportionment Comm'n*, 65 *N.J.* 125, 135 (1974). Neither the Commission nor the Law Division explicitly tested the notion whether Newark and Jersey City can be divided into two districts each consistent with federal law. In sum, we cannot determine the validity of the 2001 apportionment plan on the present record. We respectfully dissent.

LaVECCHIA, J., dissenting.

Article IV, § 2, ¶ 3 of the New Jersey Constitution was, until today, a vital provision of our law. A majority of the Court is content to jettison the provision based on a perceived Supremacy Clause concern. I disagree with the Court's presumption of a prior invalidation of the state constitutional provision based on past decisions of this Court. I also disagree that the record supports the majority's conclusion that, in any event, Supremacy Clause

concerns require our constitutional provision to be declared unenforceable in this instance. In my view, the majority misperceives the interplay between the Voting Rights Act (VRA), 42 *U.S.C.A.* § 1973, and our State Constitution.

I.

In 2001, the Legislative Apportionment Commission adopted a plan dividing Newark and Jersey City into three legislative districts each. Litigation ensued, in which plaintiffs contended that the 2001 plan violates the mandate of Article IV, § 2, ¶ 3, which provides:

> The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

No one disputes that application of that mathematical formula would divide Newark and Jersey City into two legislative districts each.

On cross-motions for summary judgment, the trial court ruled, among other things, that the Commission was not bound by the restrictions set forth in Article IV, § 2, ¶ 3. The court held that the abrogation of the county-line mandate, announced first in *Scrimminger v. Sherwin*, 60 *N.J.* 483 (1972), and reexamined and reaffirmed in *Davenport v. Apportionment Comm'n*, 65 *N.J.* 125 (1974), freed the Commission from the necessity of adhering to the whole-municipality concept in cases of large municipalities such as Newark and Jersey City. The court, therefore, granted summary judgment to the Commission.

The Appellate Division reversed, declaring that the language of Article IV, § 2, ¶ 3 that requires dividing Newark and Jersey City into two districts never was invalidated under our prior case law but remains the starting point for legislative reapportionment. *McNeil v. Legislative Apportionment Comm'n of State of N.J.*, 357 *N.J. Super.* 74, 86 (2003). The court, in effect, granted summary judgment in favor of plaintiffs, remanding the case to the Commission for creation of a reapportionment plan that conforms with our Constitution. *Id.* at 93. We stayed the Appellate Division order, permitting the Commission's plan to remain in effect. 176 *N.J.* 71 (2003).

I agree with the Appellate Division to the extent that it concluded that the constitutional provision at issue remains operable, and need only give way in the face of superior federal voting-rights principles. In other words, every legislative apportionment initiative should begin with our Constitution and if our Constitution can be adhered to consistent with federal law, it should be. I do not subscribe to the majority's conclusion that past departures from Article IV, § 2, ¶ 3 effectively have rendered that provision a nullity. I interpret our prior cases as

having been decided on their unique facts and not within the context of the present dispute.

The Court addressed Article IV, § 2, ¶ 3, as it applies to counties, in *Scrimminger*, *supra*. The 1970 census revealed that the twenty-one counties in New Jersey had significantly different populations. *Scrimminger*, *supra*, 60 *N.J.* at 495. Because of the disparity in population, "the counties, under the present distribution of the State's population, [could not] constitute separate districts. Nor [were] they suitable building blocks for the formation of meaningful districts." *Id.* at 487. Adherence to county lines was determined to result in a violation of the one-man one-vote principle, in that constitutionally unacceptable deviations in population would occur between districts. *Id.* at 498. Thus, in respect of counties, it was "plain that this limit in our State Constitution exceeds what the Federal Constitution permits." *Id.* at 489.

In determining that county-line adherence was impossible, the Court had this to say about municipalities:

> Municipal lines should be observed, if possible, for if they are followed, dividends may be expected in terms of furthering the relationship of these political subdivisions and the State and also in terms of restraining to some extent the opportunities for drawing lines for partisan advantage. Municipalities are thus appropriate building blocks for the creation of districts. The boundaries of larger municipalities will of course have to be breached, and in this regard, the Commission *may* have to depart from the direction in Art. 4, § II, ¶ 3, concerning the division of a municipality.
>
> [*Id.* at 497-98 (emphasis added).]

The Apportionment Commission viewed that language as license to disregard freely the mandate of the Constitution in respect of municipal boundaries. That interpretation ignores the discussion's context: the need to ensure that "every man's vote should equal another's," and the problems created by the use of large, demographically unequal counties as building blocks. *Ibid.* Against that backdrop, and in recognition of that concern, we hypothesized that the municipality provision in the Constitution "may" have to be breached at some later date. *Ibid.* But the one-man one-vote question is not implicated here, for there is no allegation that the division of Newark and Jersey City into only two districts each would result in impermissible population variations.

Although plainly not dispositive, *Scrimminger* is important for recognizing the importance of unified municipal representation in the State Legislature. The Court acknowledged that "dividends" would flow from restrained division of municipalities in district representation in that it would foster better relations between the municipality and State, and would curb the drawing of lines for partisan advantage. *Id.* at 498. Similarly, the United States Supreme Court has acknowledged that respect may be accorded to municipal boundaries as a "legitimate consideration" and "traditional districting principle." *Mahan v. Howell*, 410 *U.S.* 315, 329, 93 *S. Ct.* 979, 987, 35 *L. Ed.* 2d 320, 333 (1973); *see also In re Legislative Redistricting*, 805 *A.*2d 292, 319 (Md. 2002) (recognizing value of maintaining integrity of political subdivisions); *In re Reapportionment*, 624 *A.*2d 323, 330 (Vt. 1993) (observing that "unnecessary fragmentation of [municipalities] limits the ability of local constituencies to organize effectively and increases voter confusion and isolation"); *Carstens v.*

Lamm, 543 *F. Supp.* 68, 82 (D. Colo. 1982) (recognizing frequent use of respect for municipal boundaries as criteria in evaluating redistricting plan); J. Gerald Herbert, *Redistricting in the Post-2000 Era*, 8 *Geo. Mason L. Rev.* 431, 451 (2000) (same). As the Supreme Court has stated, respect for boundaries of political subdivisions may be considered in that it

> insur[es] some voice to political subdivisions, as political subdivisions. . . . [L]ocal government entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.
>
> [*Reynolds v. Sims*, 377 *U.S.* 533, 580-81, 84 *S.Ct.* 1075, 1091, 12 *L. Ed.* 2d 506, 538 (1964).]

In my view, the clear, unambiguous language of our Constitution required the Commission to divide Newark and Jersey City into no more than two districts each, and could not be ignored unless it would have been impossible to comply with both federal and state requirements. See *Scrimminger*, *supra*, 60 *N.J.* at 489. Although I acknowledge that the provision has been breached in practice in the past, without objection from either political party, it is this Court's duty when presented squarely with the question of the provision's enforceability to answer that legal question of constitutional significance cognizant of, but not foreclosed by, what went before. The unambiguous language is entitled to enforcement by this Court unless there is a contradictory requirement of higher law. *See, e.g.*, *Stephenson v. Bartlett*, __ *S.E.*2d __ (N.C. 2003) (holding that redistricting plan violated state constitutional

mandate, and thus affirming trial court's findings that: 1) challengers of redistricting plan proved that it was possible to comply with both VRA and state requirements; and 2) defendants failed to show any federal law required violation of state constitution in order to create redistricting plan).

Before addressing the question of conflict with federal requirements, however, the majority's "contemporaneous construction" analogy requires comment. The dispute in this matter concerns not the meaning of the constitutional words. It concerns their enforceability. There is a difference in kind, not degree, between interpretation and enforceability. The principle of contemporaneous construction may be of persuasive use when there is an ambiguity, when there is some doubt, or when the literal interpretation of an enactment creates a result that is at odds with the legislative intent underlying a statutory enactment. But that is not the case here. The constitutional words involved in this dispute are not ambiguous. Nor is enforcement of the provision at odds with any discerned legislative intent. The only question is whether the words of the Constitution themselves are enforceable, and that constitutional question is not subject to resolution based on a principle of statutory construction.

II.

I would have gone along with my dissenting colleagues who argue for a remand of this matter to the Law Division because the parties do not agree that a plan dividing Newark and Jersey City into two districts each can be forged consistent with federal voting-rights law. We simply do not know at this point. The trial court did not

test that notion because of its holding concerning the abrogation of Article IV, § 2, ¶ 3. We know that the Apportionment Commission did not try to comply, believing that it was not necessary. Thus, the answer to this question is seemingly not available from the Commission's record of its action. Assuming further proceedings are necessary, I also would have agreed to impose on plaintiffs the burden of going forward with at least one plan dividing Newark and Jersey City into two districts each along with the burden of demonstrating that it is substantially certain that such a plan would not violate federal voting-rights principles. Upon plaintiff's proof that our Constitution could have been followed consistent with federal law, the presumed validity of the Commission's 2001 plan would be deemed rebutted. *Davenport*, *supra*, 65 *N.J.* at 135.

The majority dispenses with those procedural requirements, however, and proceeds to make findings and render conclusions unsupported by this record. In so doing, the Court, in my view, misperceives the requirements of the VRA.

III.

An understanding of the fundamentals of the VRA is crucial to the analysis of its intersection with our Constitution. Congress passed the VRA after significant examination of the problem of racial discrimination in voting. *South Carolina v. Katzenbach*, 383 *U.S.* 301, 315, 86 *S. Ct.* 803, 808, 15 *L. Ed.* 2d 769, 779 (1966). Hours of hearings were held in which witnesses detailed the "literacy tests" and other means utilized in certain areas to prevent minority citizens from exercising their right to vote. *Id.* at 309, 86 *S. Ct.* at 808, 15 *L. Ed.* 2d at 775.

The bulk of the VRA is aimed at the so-called "covered" jurisdictions. *Id.* at 316, 86 *S. Ct.* at 812, 15 *L. Ed.* 2d at 779. The original enactment of Section 5 provided that a "covered" jurisdiction was one for which two findings had been made: (1) as of November 1, 1964, it maintained a voting "test or device," and (2) less than 50% of voting-age residents were registered on November 1, 1964. *Id.* at 317, 86 *S. Ct.* at 813, 15 *L. Ed.* 2d at 780. In 1970, the scope of covered jurisdictions was extended to jurisdictions meeting that two-part test as of November 1, 1968, and in 1975 the date was again extended to November 1, 1972. Section 5 Covered Jurisdictions, available at http://www.usdoj.gov/crt/voting/sec_5/covered.htm. To date, covered jurisdictions include whole states, such as Mississippi, Alabama, Georgia, Louisiana, and South Carolina; counties, including five in California, five in Florida, and three in New York; and even municipalities, including towns in Michigan and New Hampshire. *Ibid.* Neither the State of New Jersey nor any of its political subdivisions are covered jurisdictions under Section 5 of the Act. *Ibid.*

Covered jurisdictions under Section 5 must obtain "preclearance" before making any changes in an apportionment map. 42 *U.S.C.A.* § 1973c. Changes in election procedures, including redistricting, will be precleared unless they "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *City of Lockhart v. United States*, 460 *U.S.* 125, 134, 103 *S. Ct.* 998, 1004, 74 *L. Ed.* 2d 863, 872 (1983) (citation omitted). Thus, Section 5 is intended to "freeze in place at least the minimum minority influence that existed prior to the time a covered jurisdiction adopted a change." Katherine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by*

Districting Guidelines for Legislators, Litigants, and Courts, 36 *U. Rich. L. Rev.* 137, 172 (2002). In analyzing whether preclearance is warranted, then, one must compare the new plan to the so-called "benchmark" plan (*i.e.*, the existing, previously precleared plan) to ensure that the new plan provides the same extent of minority opportunity. *Ibid.* Section 5 is a safeguard of the status quo in covered jurisdictions, intended to prevent the erosion of existing minority political opportunities. No one contends that Section 5 controls this case.

Section 2, on the other hand, provides a remedy in situations in which a complainant brings an action and establishes the existence of a violation of voting rights. 42 *U.S.C.A.* § 1973a. A party successfully establishes a violation of Section 2 if "based on the totality of the circumstances," it is proven that

> the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> [42 *U.S.C.A* § 1973b.]

To challenge a plan under Section 2, a party bears the burden of showing:

> (1) that a minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

[*Thornburgh v. Gingles*, 478 *U.S.* 30, 50-51, 106 *S. Ct.* 2752, 2766-67, 92 *L. Ed.* 2d 25, 46-47 (1986).]

A reapportionment commission certainly faces a complicated task. When drawing legislative lines, a commission must be cognizant of minority representation and aware of the possibility that a Section 2 challenge might be brought by some future litigant. One commentator points out that, in respect of Section 2 considerations, redistricting commissions should analyze whether any of the *Gingles* factors are present when making race-based adjustments to plans. Inglis Butler, *Redistricting in a Post-Shaw Era*, *supra*, 36 *U. Rich L. Rev.* at 263.

The majority presumes, in the absence of a record, that the "packing" of minority citizens into the constitutionally mandated number of districts "constitutes" an outright violation of Section 2. *Ante* at __ (slip op. at 23). I do not. Before one can make that legal conclusion, one must be satisfied that *all three* prongs of the *Gingles* test are present. There is nothing in this barren record that comes close to analyzing what Section 2 effect this plan might have, or what effect a plan that complies with the constitutional mandate might have.

According to the majority, enforcement of our Constitution "deprives" the Commission of the ability to create influence districts. The majority considers the creation of influence districts to be "the predicate of a state's obligation of compliance with Section 2." *Ante* at ___ (slip op. at 22). Again, that presumes that a Section 2 claim could be successful in New Jersey. To support that presumption, the majority must accept that racially polarized voting does exist in New Jersey, as required by *Gingles*. However, the record does not contain any support for that prong of

the *Gingles* test. The assertion of deprivation is meaningless unless a violation of Section 2 is proven.

To the extent that the majority believes that its conclusion is compelled by recent caselaw, I cannot agree. The majority's holding, sweeping aside part of our Constitution's requirements, ignores the fact that the United States Supreme Court has never held that influence districts are a "predicate" of a state's Section 2 obligation. Indeed, it remains an open question whether Section 2 so-called "influence" claims are viable challenges to redistricting plans. An "influence district" is defined as a district in which the minority group "could influence the outcome of election contests and possibly elect candidates of its choice with white cross-over support." Butler, *Redistricting in a Post-Shaw Era*, *supra*, 36 *U. Rich. L. Rev.* at 162. Thus, the proponent of an "influence-district" claim would argue that a redistricting plan is improper if it contains districts with majority populations of minority voters instead of a larger number of "influence districts" that would increase the likelihood of electing more of the group's candidates of choice. *See, e.g.*, *Voinovich v. Quilter*, 507 *U.S.* 146, 154, 113 *S. Ct.* 1149, 1155, 122 *L. Ed.* 2d 500, 511 (1993).

But the *Gingles* test – which is the current standard for Section 2 claims – suggests that a claim based on dilution of minority influence could not survive, because the first prong requires that a minority group be large enough to constitute a majority in a district. The Supreme Court recognized as much in *Voinovich*, *supra*, noting that if it were to assume that influence claims are actionable, "the first *Gingles* precondition . . . would have to be modified or eliminated." 507 *U.S.* at 158, 113 *S. Ct.* at 1157, 122 *L. Ed.* 2d at 514 (holding that Court need not reach

question of influence-dilution claim because complainant failed to prove *Gingles*'s third requirement (white bloc voting)). The Court has left that question for another day. *Id.* at 154, 113 *S. Ct.* at 1155, 122 *L. Ed.* 2d at 511.

The majority relies on the recently decided *Georgia v. Ashcroft*, __ *U.S.* __, __ *S. Ct.* __, __ *L. Ed.* 2d __ (2003), wherein the Supreme Court recognized that influence districts can be a valuable tool for redistricting authorities to employ to ensure that new redistricting plans satisfy the Section 5 retrogression analysis. There, the State of Georgia sought preclearance of its redistricting plan, arguing that its new plan, as compared to the benchmark plan in place, was not "retrogressive" because it "unpacked" minorities to create more influence districts. *Id.* at ___, ___ *S. Ct.* at ___, ___ *L. Ed.* 2d at ___ (slip op. at 5). The Court held that the State's strategy of creating influence districts sufficed to establish that the new plan was not retrogressive under Section 5. *Ibid.*

In analyzing whether the plan satisfied the preclearance standard, the Court noted the distinctions between Section 5 and Section 2, pointing out that the two provisions "combat very different evils, and, accordingly . . . impose very different duties upon the States." *Id.* at ___, ____ *S. Ct.* at ___, ___ *L. Ed.* 2d at ____ (slip op. at 8). Indeed, the Court observed that the Section 2 inquiry "differs in significant respects from a Section 5 inquiry," in that a Section 5 inquiry is concerned solely with a "comparison of a jurisdiction's new voting plan with its existing plan." *Id.* at ___, ___ *S. Ct.* at ___, ___ *L. Ed.* 2d at ___ (slip op. at 8) (citing *Gingles, supra*, 478 *U.S.* 30, 106 *S. Ct.* 275, 92 *L. Ed.* 2d 25). Thus, "while some parts of the Section 2 analysis may overlap with the Section 5 inquiry, the two

sections differ in structure, purpose, and application." *Ibid.* (quotation omitted).

The Court examined the standard for retrogression, noting that a plan must be analyzed by its overall effect in determining whether it retrogresses from the benchmark. *Id.* at ___, ____ *S. Ct.* at ___, ___ *L. Ed.* 2d at ___ (slip op. at 9). The Court cautioned that the ability of minority voters to elect a candidate of choice is "complex in practice to determine." *Ibid.* It noted the various methods by which the State may maximize electoral success of a minority group, including the creation of majority-minority districts and so-called "influence districts." *Ibid.* (citing *Gingles*, *supra*, 478 *U.S.* at 48-49, 106 *S. Ct.* at 2572, 92 *L. Ed.* at 73 (O'Connor, J., concurring)). In setting forth those methods, including the creation of influence districts, the Court pointed out that "*Section 5* gives the State the flexibility to choose one theory of effective representation over the other," and "leaves room for States to use these types of influence and coalitional districts." *Id.* at ___, ___ *S. Ct.* at ___, ___ *L. Ed.* 2d at __ (slip op. at 9) (emphasis added).

The majority pounces on that Section 5 analysis to hold that "unpacking" is a "tool" that cannot be taken away from the Commission. *Ante* at __ (slip op. at 22). In *Ashcroft*, the Supreme Court's holding was narrow: Georgia met its burden under Section 5 to show that its redistricting plan did not retrogress from the benchmark plan. In reaching that conclusion, the Court noted that influence districts can be as effective as majority-minority districts in the context of a Section 5 retrogression analysis. To support that proposition, it cited Justice O'Connor's concurrence in *Gingles*, *supra*, in which she set forth the

various means of reapportionment to maximize minority-voting strength.

But what the Court clearly did not do is alter its standard for a Section 2 claim: *Gingles* is still the standard. There is nothing in *Ashcroft* to the contrary. To suggest that the Court's inclusion of influence districts in its Section 5 retrogression analysis means that the failure to create such districts now presents a cognizable claim under Section 2 is to assume that the Court would overrule nearly twenty years of precedent without explicitly stating as much. The United States Supreme Court usually is not so timid in its pronouncements. The majority's leap of logic is unwarranted; its explanation not compelling. It is a leap that this Court should not take. Sadly, it is a leap that sounds the death knell for our constitutional mandate that honors the geographical boundaries of our municipalities, even the largest of them, when the State engages in legislative reapportionment. I must respectfully dissent.

Supreme Court of New Jersey
M-728 September Term 2002
54,209

ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO, AND KEVIN J. O'TOOLE,

Plaintiffs-Respondents,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY,

Defendant-Movant,

And

REGENA L. THOMAS, Secretary of State of New Jersey, and DAVID SAMSON, Attorney General of New Jersey,

Defendants.

ORDER
(Filed Mar. 6, 2003)

This matter having come before the Court on an application for a stay of the judgment off the Appellate Division pending disposition of movant's appeal,

And the Court having considered the moving papers and supplemental briefs filed by the parties,

And the Court being of the view that the standards informing the grant of a stay when an issue of significant public importance is raised must include not only the traditional factors applicable to disputes between private parties but also, and most paramount, considerations of the public interest,

And the Court being satisfied that the public interest is best served and harm to the voting public best avoided by assuring certainty at this time in the 2003 electoral cycle and consequently, by maintaining the status quo,

And it appearing that since the adoption of art.IV, §2, ¶3 of the New Jersey Constitution nearly forty years ago, Newark and Jersey City have been divided into at least three legislative districts each,

And it further appearing that that division constitutes the status quo in the case based on long-standing contemporaneous and practical construction of the New Jersey Constitution,

And good cause appearing;

IT IS ORDERED that the motion for a stay pending disposition of defendant's appeal is granted.

WITNESS, the Honorable James H. Coleman, Jr., Presiding Justice, at Trenton, this 6th day of March, 2003.

/s/ [Illegible]
Clerk of the
Supreme Court

JUSTICES COLEMAN, LONG, and ZAZZALI, and JUDGE PRESSLER (t/a) join in the Court's Order in its entirety. JUSTICE VERNIERO has filed a separate CONCURRING and DISSENTING opinion in which JUSTICE ALBIN joins. JUSTICE LaVECCHIA has filed a separate DISSENTING opinion.

VERNIERO, J., Concurring in part and Dissenting in part.

The parties essentially do not dispute that dividing Newark and Jersey City each into three legislative districts violates the plain language of article IV, section 2 of the New Jersey Constitution. The critical issue is whether the higher authority of federal law mandates that departure from State law. In my view, that issue presents a mixed question of law and fact for which summary judgment is not appropriate. From that narrow perspective, I conclude at this juncture that both the Law Division and the Appellate Division erred in disposing of this case in summary fashion.

Accordingly, I would remand this matter to the Law Division to conduct a hearing and establish a proper evidentiary record on which that court might then base an ultimate disposition. I would retain jurisdiction and review the Law Division's determination on the merits only after an adequate record has been created. Because my intended disposition is premised on the belief that the matter is not ripe for summary judgment, I would leave the existing district lines in place for the 2003 legislative elections. For all practical purposes, those elections already have begun notwithstanding that nominating petitions are not due until next month under the applicable provision of Title 19.

JUSTICE ALBIN joins in this opinion.

LaVECCHIA, J., Dissenting.

Movant, The Legislative Apportionment Commission of the State of New Jersey (Commission), applies for a stay of the Appellate Division judgment declaring the 2001

legislative apportionment map in violation of the New Jersey Constitution and ordering the Commission to draw a new legislative map. Because I am not persuaded that movant has established any of the necessary predicates to the equitable relief it seeks, I would deny the stay and require the Commission to create a new legislative apportionment map as the Appellate Division directed on January 22, 2003.

When seeking the equitable relief of a stay pending appeal of a judgment, a movant must demonstrate that: (1) irreparable harm will result from enforcement of the judgment pending appeal; (2) the appeal presents a meritorious issue, and movant has a likelihood of success on the merits; and (3) assessment of the relative hardship to the parties reveals that greater harm would occur if a stay is not granted than if it were. *Crowe v. DiGioia,* 90 *N.J.* 126, 132-34 (1982).

Turning first to the assessment or reparable harm, the Commission argues that even assuming that the Commission's 2001 legislative apportionment map is unconstitutional, that map nonetheless should be used for the 2003 cycle of elections because there is not enough time to promulgate a new apportionment scheme for the upcoming June primary elections. A stay of the Appellate Division judgment is said to be necessary to avoid chaos. In arguing that a new map cannot be readied for use in the upcoming primaries, the Commission never explains what harm it would suffer were it, even now, to be at work drafting an alternative map to have in readiness in the event this Court agrees with the Appellate Division and declares the 2001 map in violation of our Constitution. Indeed, it is obvious from this record that the Commission's work is largely performed by computer programs. The Commission

does allude to a cost drain to the Commission if it had to work on an alternative map. That, however, cannot support a claim of irreparable harm. Harm is not irreparable if it can be remedied with monetary relief, or stated conversely, "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." *Id.* at 132-33 (citing *Hodge v. Giese,* 43 *N.J. Eq.* 342, 350 (Ch. 1887)).

I find the Commission's argument for a stay to be unpersuasive for two reasons. First, to the extent the hour is "late" in terms of the election cycle, the fault in large part lies with the Commission. The Appellate Division issued its decision in this matter on January 22, 2003. *McNeil v. Legislative Apportionment Comm'n,* 357 *N.J. Super.* 74 (App. Div. 2003). Yet, the Commission has done nothing to date to comply with the Appellate Division's mandate. Instead, it voted the next day *not to comply* and to seek a stay. There is no reason why the Commission could not have prepared a plan in accordance with the mandate of the Appellate Division while it simultaneously sought to stay that mandate for the 2003 election cycle. By not doing so, the Commission itself has created in large measure the time pressure it now complains of. The Commission's position is hardly a sympathetic one for a party seeking equitable relief.

Second, turning to the argument that it is in fact too late to prepare and implement a new legislative apportionment plan for the upcoming primary elections, this Court should not ignore the amount of time that the Constitution provides for performance of this function in the first instance. And, the Court should not ignore past time periods for implementation of apportionment plans when considering the Commission's claims of unacceptable

confusion and impossibility of implementation. Our Constitution presumes that even in the event of a "deadlock" of the bipartisan legislative apportionment commission requiring the appointment of an eleventh tie-breaking member, an apportionment plan can be completed within thirty days of appointment of the tie breaker. *N.J. Const.* art. IV, § 3, ¶1; art. IV, § 3, ¶2. That is not to say that thirty days are required in all circumstances; for example, in 2001, Professor Bartels was able to select and obtain certification on a plan only fifteen days after his appointment. *Page v. Bartels,* 144 *F. Supp.* 2d 346, 349 (D.N.J. 2001). Indeed, the "lateness" of the plan in respect of its timing in the election process did not prevent its usage in 2001: the Bartels plan was "cleared" for implementation on April 24, 2001, only two months before the scheduled primary. *Page v. Bartels,* 248 *F.*3d 175, 198 (3d Cir. 2001). Notwithstanding the Commission's delay to date in implementing the Appellate Division's order, our Constitution presumes that there remains ample time to draw an alternative plan. If the Court were to deny this application for a stay and the Commission would begin work now, there is no reason why a plan could not be prepared in time for the 2003 election cycle. The Commission has not presented a compelling argument for irreparable harm when adherence to our constitutional mandate is at stake and the chaos and confusion that the Commission urges on us largely is caused by its own delay in disregarding the express directive of the Appellate Division.

The Commission also has not demonstrated a reasonable probability of success on the merits. Its position misapprehends the interplay between the Voting Rights Act, 42 *U.S.C.A.* § 1973, and our State Constitution. Stated simply, the Voting Rights Act's purpose is to remedy

situations in which a complainant has met its burden of establishing a violation of voting rights, not to override all state law districting requirements.[1] The clear, unambiguous language of our Constitution in respect of municipal boundaries requires, in its application, that the Commission divide Newark and Jersey City into no more than two districts each. *N.J. Const.* art. IV, § 2, ¶ 3. That express mandate of our organic law must be honored unless it is impossible to comply with it and pertinent federal voting rights requirements. See *Scrimminger v. Sherwin,* 60 *N.J.* 483, 492 (1972) (holding constitutional provision proscribing division of counties inapplicable because it could not be satisfied without violating federal one-man, one-vote requirement).

The Commission here had an obligation to reapportion the legislative districts in compliance with the constitutional formula, unless that could not be accomplished without violating a federal Voting Rights Act requirement. That placed a duty on the Commission to prove the necessity to deviate from the constitutional command. Stated differently, because the Commission's 2001 plan does not comply with the State Constitution's requirement that it not divide either Newark or Jersey City into more than two legislative districts, the 2001 plan is presumptively unconstitutional and the burden of persuasion shifted to

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[1] A party challenging a plan under the Act bears the burden of showing: (1) that a minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. [*Thornburgh v. Gingles,* 478 U.S. 30, 50-51, 106 *S. Ct.* 2752, 2766-67, 92 *L. Ed. 2d* 25, 46-47 (1986).]

the Commission to demonstrate that it could not divide those cities into only two districts without violating federal law governing voting rights. The Commission has not done so. In response to the direct question of this Court, it states that it "cannot confidently predict today that it is impossible to place Newark and Jersey City into two districts each without running afoul of the Voting Rights Act." Thus, unlike the circumstances in *Scrimminger, supra,* where the State Constitutional provision pertaining to county boundaries had to give way in order to comply with the requirements of the rule of one-person, one-vote, impossibility is not the Commission's justification for failing to reconcile the Constitution's formula applicable to municipal boundaries with Voting Rights Act requirements.

It is not enough for the Commission to argue that similar offenses to the State Constitutional provision concerning municipal boundaries appear to have occurred in the past. No similar legal challenge to past plans was ever presented. This Court's duty, when squarely presented with the issue, is to consider and apply the Constitution's unambiguous language unless the Commission can prove that such compliance cannot be obtained without violating federal law. As noted, however, the Commission has not even alleged – much less established – that it is impossible to devise a plan that satisfies both federal law and the State Constitution. Absent that allegation, its plan is presumptively invalid as a matter of law. Our Constitution must yield to federal voting rights requirements, but only when there is no other way to satisfy the pertinent federal requirement. The question is whether satisfaction of the requirements of the Voting Rights Act *compels* violation of the New Jersey Constitution. *See, e.g.,*

IMO Legislative Districting of the State, 805 A.2d 292 (Md. 2002). Absent a showing that there is a paramount federal concern that cannot be remedied any other way, the Commission's departure from our Constitution's unequivocal mandate concerning the division of municipalities should be rejected.

Finally, in comparing the relative hardship of the parties, it only need be repeated that the Commission created much of its alleged "hardship" by refusing, for over a month, to comply with the order to draw a new map. Notwithstanding that unjustified delay, there appears to be sufficient time to put in place a new map that conforms with our Constitution, if the Commission moves with dispatch. Even if the Commission took thirty days to complete a map, the successfully conducted 2001 election indicates the absence of any hardship here, where there is only minimally less time.

On the other side of the balance of hardships, absent a new district map for the upcoming election, Jersey City, Newark, and the rest of this State will be forced to endure a patently unconstitutional apportionment scheme. The Commission argues that continuance of that scheme need only be tolerated for two years. That is not technically correct. The members of the Senate are being elected to a four-year term; the members of the General Assembly are being elected to a two-year term. *N.J. Const.* art. IV, § 2, ¶2 and ¶4. But even taking the Commission argument at face value, utilizing an unconstitutional plan for any election cycle is intolerable if it is possible to put a conforming plan in place. The State is not confronted with an upcoming general election. The State is in preparation for a June *primary* election that precedes, by months, the statewide election that will not occur until November.

Clearly, the State has the wherewithal to adjust to the practicalities involved in resolving this constitutional issue now.

I would deny the stay.

Supreme Court of New Jersey
C-732 September Term 2002
54,209

ANNE M. McNEIL,
THOMAS E. WILLIAMS,
ROSEANNA SIEBERT,
PAUL DiGAETANO,
AND KEVIN O'TOOLE,

Plaintiffs-Respondents,

v.

THE LEGISLATIVE APPORTIONMENT
COMMISSION OF THE
STATE OF NEW JERSEY,

Defendant-Petitioner,

And

REGENA L. THOMAS,
Secretary of State of New Jersey
and DAVID SAMSON,
Attorney General of New Jersey,

Defendants.

To the Superior Court, Appellate Division:

This matter having come before the Court on a petition for certification from the judgment in A-1027-01, and the Court having considered the same, together with all of the briefs filed in respect of defendant's application for a stay pending appeal (see the Order in M-728-02);

IT IS ORDERED that the petition for certification is granted; and it is further

ORDERED that petitioner and respondents shall contemporaneously serve and file a single supplemental brief within fourteen days of the filing date of this Order, that brief to be the sole additional brief either party may file; and it is further

ORDERED that this matter shall be set down for oral argument on Monday, April 28, 2003, at 10:00 a.m. in the Supreme Court courtroom, Hughes Justice Complex, Trenton.

WITNESS, the Honorable James H. Coleman, Jr., Presiding Justice, at Trenton, this 6th day of March, 2003.

/s/ Stephen W. Sownsend
Clerk of the Supreme Court

ORDER ON MOTION

ANNE M. McNEIL, ET AL. v. THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, ETC.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1027-01T5 MOTION NO. M-2863-02 BEFORE PART: C JUDGE(S): PETRELLA LINTNER PARKER

MOTION FILED: FEBRUARY 05, 2003

ANSWER(S) FILED: FEBRUARY 07, 2003

SUBMITTED TO COURT: FEBRUARY 10, 2003

BY: LEGISLATIVE APPORTIONMENT COMMISSION
BY: ANNE M. McNEIL, ET AL. IN CROSS-MOTION, M-2926-02

ORDER

(Filed Feb. 10, 2003)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 10TH DAY OF FEBRUARY 2003, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT
– FOR STAY
– TO FILE OVERLENGTH BRIEF

GRANTED	DENIED	OTHER
	X	X

SUPPLEMENTAL:

The stay is denied. There is no irreparable harm by preparing a new map whether or not there are further appeals. *Crowe v. DeGioia*, 90 *N.J.* 126, 133 (1982); *Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 *N.J. Eg.* 299, 303 (E. & A. 1878).

See Order on M-2926-02.

FOR THE COURT:

/s/ James J. Petrella
JAMES J. PETRELLA, P.J.A.D.

ORDER ON CROSS-MOTION

ANNE M. McNEIL, ET AL. v. THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, ETC.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1027-01T5 MOTION NO. M-2926-02 BEFORE PART: C JUDGE(S): PETRELLA LINTNER PARKER

CROSS-MOTION FILED: FEBRUARY 07, 2003

ANSWER(S) FILED:

SUBMITTED TO COURT: FEBRUARY 10, 2003

BY: Anne M. McNeil, et al.

ORDER

(Filed Feb. 10, 2003)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 10TH DAY OF FEBRUARY 2003, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT
– TO COMPEL LEGISLATIVE APPORTIONMENT COMMISSION TO MEET AND PREPARE A NEW MAP

GRANTED	DENIED	OTHER
	X	X

SUPPLEMENTAL:

The Court's opinion is its mandate.

See Order on M-2863-02.

FOR THE COURT:

/s/ James J. Petrella
JAMES J. PETRELLA, P.J.A.D.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1027-01T5

ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO, and KEVIN O'TOOLE,

Plaintiffs-Appellants,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY,

Defendant-Respondent,

and

REGENA L. THOMAS, Secretary of State of New Jersey, and DAVID SAMSON, Attorney General of New Jersey,[1]

Defendants.

Argued December 16, 2002 – Decided January 22, 2003

Before Judges Petrella, Lintner and Parker.

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[1] The complaint named Deforest B. Soaries, Secretary of State of New Jersey, and John Farmer, Attorney General of New Jersey, as defendants. Pursuant to *R.* 4:34-4, their successors in office have been substituted in the caption above.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket Number MER-L-1442-01.

Kevin B. Riordan, argued the cause for appellants (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys; Mr. Riordan, of counsel and on the brief).

Steven Siegel argued the cause for respondents (Sokol, Behot & Fiorenzo and Scarinci & Hollenbeck, attorneys; Leon J. Sokol and Robert E. Levy, of counsel; Mr. Siegel and Nomi I. Lowy, on the brief).

Donna Kelly, Senior Deputy Attorney General, argued the cause as *amicus curiae* (David Samson, Attorney General, attorney; Michael J. Haas, Assistant Attorney General, of counsel; Ms. Kelly, and Loretta E. Lonergan, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

Anne M. McNeil of Jersey City, Thomas E. Williams of Newark, Roseanna Siebert of the Borough of Bergenfield, Paul DiGaetano of Nutley, and Kevin O'Toole of the Township of Cedar Grove (collectively, plaintiffs) appeal from entry of summary judgment dismissing their complaint that contested the legislative districting plan certified on April 11, 2001 (the 2001 plan) by six of the eleven members of the New Jersey Legislative Apportionment Commission (Commission). Plaintiffs DiGaetano and O'Toole were incumbent legislators, both of whom won re-election under the 2001 plan.

The process for creating the 2001 plan began pursuant to Article IV, section 3, paragraph 1 of the New Jersey

State Constitution (Constitution), which provides for appointment of an Apportionment Commission consisting of ten members, five from each of the two major political parties, which shall meet and apportion the State legislative districts during the year following the decennial census of the United States. The districts are to be certified by February 1 in the year after the census is taken, or within one month of the Governor's receipt of the census results, whichever is later. If the Commission fails to meet the deadline, or determines before that date that it will fail, the Constitution requires the Chief Justice of our Supreme Court to appoint an eleventh member of the Commission who would break any tie vote. The districts are to be certified within one month of that member's appointment. *N.J. Const.* art. IV, § 3, ¶ 2.

A deadlock developed among the ten-member Commission composed of equal members of the two major political parties.[2] Pursuant to the Constitution's requirement, the Chief Justice appointed Larry Bartels, a university professor, as an eleventh member to the Commission. He was neither registered to vote in any election in this State nor affiliated with any political party.

Following the March 27, 2001 appointment of Bartels as the Commission's eleventh member, the deadlock was broken when the five Democratic members of the Commission agreed to the version of the 2001 plan approved by Bartels. Thus, on April 11, 2001, a six-member majority of the eleven-member Commission voted to certify the 2001

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[2] From the reported cases it appears that deadlocks are an historical fact of political history in redistricting.

plan, which was forwarded to the Secretary of State the next day. On April 17, 2001, those same members of the Commission submitted to the Secretary of State an amended certified 2001 plan, correcting certain technical errors to the plan as it had been submitted.

On May 9, 2001, plaintiffs filed their original four-count complaint in this matter in the Law Division, Mercer County. They named as defendants the Commission, the then Secretary of State of New Jersey and the then Attorney General of New Jersey. On the same day, they filed an amendment to the complaint, asserting that the redistricting plan as adopted expressed a bias against incumbent legislators. Plaintiffs also sought an order to show cause seeking temporary restraints, which the motion judge denied. Leave to appeal that denial was also denied.

The Commission filed a motion for summary judgment with supporting papers. Plaintiffs cross-moved for summary judgment on counts one and two of their complaint, the counts that asserted, respectively, that Jersey City and Newark inappropriately were divided among too many legislative districts.

By an October 12, 2001 order, the motion judge granted defendant's motion for summary judgment and denied plaintiffs' motion for summary judgment. Plaintiffs' claims were dismissed with prejudice. Plaintiffs filed a timely notice of appeal.

Plaintiffs contend that the judge on the motion hearing erred in upholding the 2001 plan because the Commission failed to honor Article IV, section 2, paragraph 3 of the Constitution. Plaintiffs rely on the specific provision in that paragraph that "no county or municipality shall be

divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State." Applying this provision (the "municipality districting standard") to municipalities, as of the 2000 census, Newark and Jersey City each should have been divided into only two legislative districts. However, under the 2001 plan they were each divided into three districts. Other issues raised in the complaint were abandoned.

A companion appeal in *Charles Steelman et al. v. The Legislative Apportionment Comm'n*, A-182-01T1, was argued the same date as this appeal and is being separately decided. Among other issues, the plaintiffs in that appeal challenged Atlantic County's subdivision among three legislative districts, relying upon the same constitutional language quoted above as it pertained to counties (a county districting standard). The restriction on dividing municipalities was not implicated or applicable in that matter.

As amended effective December 8, 1966, Article IV, section 2 of the New Jersey Constitution provides as follows:

> 1. The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.

2. Each senator shall be elected by the legally qualified voters of the Senate district, except that if the Senate district is composed of two or more counties and two senators are apportioned to the district, one senator shall be elected by the legally qualified voters of each Assembly district. ... [omitting provision about when senators' terms begin and end].

3. The General Assembly shall be composed of eighty members. Each Senate district to which only one senator is apportioned shall constitute an Assembly district. Each of the remaining Senate districts shall be divided into Assembly districts equal in number to the number of senators apportioned to the Senate district. The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the state, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

[*N.J. Const.* Art. 4, § 2, ¶¶ 1-3.]

The final sentence of paragraph 3 above contains the municipality districting standard at issue here.

According to the 2000 census figures, New Jersey's total population was 8,414,350. One fortieth of that figure was 210,359, which is considered the ideal population or goal for each of New Jersey's forty legislative districts. Jersey City's population was 240,055, exceeding the ideal district population by 29,696. Newark's population was 273,546, exceeding the ideal district population by 63,187.

As conveyed to the then Secretary of State on April 12, the 2001 plan included a "Plan Components Report" showing a district-by-district listing of municipalities, the populations of each municipality, subtotaled by municipality and county within each district, and subtotaled for the whole district. Next to each district, county, and municipality population figure is a listing of the number of individuals purporting to be (1) "NH Blk" (non-Hispanic Black) and (2) Hispanic origin.[3] The recertified corrected pages of the plan included pages showing each district's population, the ideal district population figure of 210,359, each district's deviation from the ideal, and percentages of each district's and municipality's members of minority groups, including component percentages for "non-Hisp African-American" and Hispanic populations.

The 2001 plan subdivided Jersey City and Newark each into three legislative districts. Parts of Newark were included in the 27th, 28th, and 29th Districts. The 27th District included: Caldwell, Orange, Essex Fells, Fairfield, Livingston, Maplewood, North Caldwell, Roseland, South

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[3] This information was apparently not in the population data from the U.S. Census Bureau reflected in a document in the record titled: "Table 7, Population for the Counties and Municipalities in New Jersey: 1990 and 2000."

Orange, West Caldwell, West Orange, and Newark's West ward voting districts numbers 27 through 29, 33, 35 through 41, and 45. The district's population of 206,390 was 3,969 less than the ideal district population. The Commission calculated that 44.8% of the district's residents were members of minority groups, including 29.6% (61,110) African-American and 6.8% (14,239) Hispanic residents. There were 19,641 Newark residents in the 27th District, including 14,599 African-American and 1,632 Hispanic residents.

The 28th District included: Belleville, Bloomfield, Irvington, and voting districts from parts of Newark's North, South, Central and West wards. The district's population of 217,596 was 7,237 more than the ideal district population. The Commission's figures indicated that 73.5% of the district's residents were members of minority groups, including 51.1% (111,386) African-American and 15% (32,645) Hispanic residents. There were 73,290 Newark residents in the 28th District, including 55,494 African-American and 12,151 Hispanic residents.

The 29th District included: Hillside (in Union County), and voting districts from parts of Newark's North, South, Central and East wards. The district's population of 202,362 was 7,997 less than the ideal district population. The Commission calculated that 79.8% of the district's residents were members of minority groups, including 40.4% (81,951) African-American and 34.5% (69,992) Hispanic residents. There were 180,615 Newark residents in the 29th District, including 71,990 African-American and 66,839 Hispanic residents.

Parts of Jersey City were included in the 31st, 32nd, and 33rd Districts. The 31st District included: all of Bayonne, and in Jersey City, all of the municipal voting districts within ward A, and parts of wards B, C, E and F. The district's population of 207,327 was 3,032 less than the ideal district population. The Commission's figures indicated that 66.0% of the district's residents were members of minority groups, including 28.1% (58,417) African-American and 21.7% (45,120) Hispanic residents. There were 145,485 Jersey City residents in the 31st District, including 55,319 African-American and 34,105 Hispanic residents.

The 32nd District included: Fairview (in Bergen County), East Newark, Harrison, Kearny, North Bergen, and Secaucus (in Hudson County), plus in Jersey City, parts of wards B, C, and D. The district's population of 208,227 was 2,132 less than the ideal district population. The Commission's figures indicated that 57.8% of the district's residents were members of minority groups, including 4.5% (9,401) African-American and 39.8% (83,054) Hispanic residents. There were 63,635 Jersey City residents in the 32nd District, including 6,138 African-American and 25,392 Hispanic residents.

The 33rd District included: Guttenberg, Hoboken, Union City, Weehawken, West New York, plus in Jersey City, parts of wards C and E. The district's population of 206,676 was 3,683 less than the ideal district population.[4]

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[4] For all practical purposes there is no distinction in the use of the word population, which derives from the Latin language, and the word demographics, which derives from the Greek language. Each means the populous or people.

The Commission's numbers indicated that 68.9% of the district's residents were members of minority groups, including 3% (6,383) African-American and 57.5% (118,860) Hispanic residents. There were 30,935 Jersey City residents in the 33rd District, including 2,932 African-American and 8,455 Hispanic residents.

The corrected 2001 plan indicated the prior legislative districts to which each municipality in these districts had been assigned. It also included subtotals of population numbers and minority percentages for each of the prior districts from which the new district's residents had been reassigned.

Plaintiffs alleged in their complaint that under the population pattern of the current census data, the fragmentation of Jersey City and Newark into three legislative districts each was neither warranted nor justified by any requirement of federal or state law, and was in direct contravention of the municipality districting standard in Article IV, section 2, paragraph 3 of the Constitution. They also alleged that "[n]umerous alternative apportionment plans can be, and have been, prepared" that would meet the federal and state law provisions without unnecessarily breaking up either Jersey City or Newark into more districts than are required under our State Constitution's municipality districting standard. Plaintiffs' brief asserts that they "submitted to the trial court an apportionment plan that properly divides the municipalities of Jersey City and Newark" and that their plan violates neither the Federal

Federal nor State Constitutions.[5] Summaries of the New Jersey legislative districts created since 1967 indicate that Jersey City and Newark had been divided into three districts each under plans certified in 1967, 1969, 1981 and 1991. In addition, in 1971 there were two districts for Jersey City and three for Newark, and in 1973, three districts for Jersey City and four for Newark.

In an October 1, 2001, opinion, the motion judge held that plaintiffs failed to show that the 2001 plan included "invidious discrimination or other constitutional deficiency." The judge discussed the case law construing Article IV, section 2, paragraph 3, particularly *Scrimminger v. Sherwin*, 60 *N.J.* 483 (1972), and *Davenport v. Apportionment Comm'n*, 65 *N.J.* 125 (1974) (*Davenport II*), where Senate districting plans were developed without adhering to the county-line provision of the State Constitution. The judge extrapolated:

> It thus logically follows that the *Scrimminger* Court, in abrogating the county-line provision of Article 4, Section 2, Paragraph 3, also abrogated the portion of Paragraph 3 governing

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[5] The 2001 plan was the subject of two reported federal court cases, *Page v. Bartels*, 144 *F. Supp.* 2d 346, 366-369 (D.N.J. 2001), (The 27th, 28th, 29th, and 34th Districts, withstood challenges under the Federal Constitution's Equal Protection Clause and Fifteenth Amendment and the Voting Rights Act, 42 *U.S.C.A.* § 1973 to § 1973p., and *Robertson v. Bartels*, 148 *F. Supp.* 2d 443, 453-459 (D.N.J. 2001), *aff'd*, 534 *U.S.* 1110, 122 *S. Ct.* 914, 151 *L. Ed. 2d* 881 (2002) (dismissed challenges to new 27th and 34th districts on *res judicata* grounds following *Page*, and alternatively found claims of impermissible racial gerrymandering and disparate treatment of incumbent legislators based upon race were meritless). Of course, neither decision is binding on our courts. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 *N.J.* 69, 79-80 (1990).

> the division of larger municipalities. The very structure and language of the *Scrimminger* decision leads to this conclusion. In the same paragraph in which the *Scrimminger* Court enunciated its holding that "the county cannot now serve as the basis of districting . . . " the Court stated, "[t]he boundaries of the larger municipalities *will of course have to be breached*, and in this regard, the Commission may have to depart from the direction of Art. 4, Section II, Paragraph 3, concerning the division of a municipality." *Scrimminger*, 60 *N.J.* at 498 (emphasis added). This provision, like the county-line provision, thus ceases to have any viability in New Jersey's reapportionment scheme.

The court found nothing in *Scrimminger* or *Davenport* to prevent a reapportionment commission, "in an effort to satisfy the paramount concern of population equality and the myriad of other important statutory and constitutional requirements," from "dividing a larger municipality into more than two districts." The judge noted that aside from the allegation that Jersey City and Newark were divided into too many districts, plaintiffs did not allege or prove any constitutional or other infirmities of the 2001 plan. The judge felt that the 2001 plan met the paramount consideration of population equality, satisfied requirements of contiguity and compactness, adhered to the boundary lines of smaller municipalities, and was not tainted with invidious discrimination or other legal infirmities.

The judge noted that in the four legislative districting plans approved since the New Jersey Constitution's amendment in 1966, Newark and Jersey City had been divided into more than two legislative districts and those

plans were nonetheless approved despite dividing Newark and Jersey City into more than two legislative districts. The judge rejected plaintiffs' assertion that no court had ever specifically addressed the question of dividing Newark and Jersey City each into more than two legislative districts. The judge quoted from the decisions in the *Davenport* litigation, noting first the Appellate Division opinion "[t]he Commission followed the *Scrimminger* directive to use municipalities as building blocks, with necessary exceptions in the case of Newark and Jersey City." *Davenport v. Apportionment Comm'n*, 124 *N.J. Super.* 30, 42 (App. Div. 1973), *aff'd*, 65 *N.J.* 125 (1974)). Affirming that districting plan, the Supreme Court concluded "that the Commission plan adequately carries out the mandate of *Scrimminger* and has not been shown to be in violation of any State or Federal constitutional standards." *Davenport II*, *supra* (65 *N.J.* at 135). The motion judge here thus concluded that "[t]his language makes it abundantly clear that the Court considered the division of Newark and Jersey City into more than two legislative districts."

The judge indicated that while the courts have held that Newark and Jersey City were "'necessary exceptions' from the Article IV, Section 2, Paragraph 3 prohibition on dividing municipalities into multiple legislative districts, they have never suggested that the division of smaller municipalities is appropriate." Accordingly, the judge interpreted those cases "as abrogating Article IV, Section 2, Paragraph 3 only in reference to municipalities with populations exceeding one-fortieth of the State's total number of inhabitants." The judge explained:

> *Scrimminger* does not provide the reapportionment commission with unbridled discretion to divide municipalities regardless of their population,

> as it recognized that as a general rule, municipalities are appropriate "building blocks" for the creation of legislative districts. It is only when a municipality's size makes it a "necessary exception" that the commission is warranted in dividing the municipality into more than one legislative district.

Plaintiffs contend that because the plan violated the municipality districting standard their challenge to the 2001 plan should not have been dismissed, and the motion judge erroneously held that the constitutional provision setting forth that standard had been impermissibly abrogated.

The judge's reasoning that our State Constitution's municipality districting standard was abrogated does not withstand scrutiny. As noted, plaintiffs contend that their challenge to the 2001 plan should not have been dismissed because the plan violated the municipality districting standard in Article IV, section 2, paragraph 3 of the Constitution. The judge observed that the language of the municipality districting standard would limit dividing Jersey City and Newark into no more than two legislative districts, so plaintiffs met their burden of proving that the plan suffered from "constitutional deficiencies" because it divided each of those cities into three districts. The judge erred in concluding that the Constitution's municipality districting standard provision was abrogated. No case has heretofore addressed the issue of dividing municipalities contrary to that standard. The *Scrimminger* holding, that districting along county lines could not be accomplished without violating federal population equality standards, did not compel a conclusion that the municipality districting standard was abrogated. The *Scrimminger* dicta that

the Commission "may have to depart from" the municipality districting standard meant that the standard could be ignored only when necessary to satisfy a paramount federal constitutional obligation.

As this matter was decided on summary judgment motions, the motion judge was required to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, [were] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 540 (1995). Our standard of review as an appellate court mirrors that in the trial court: whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. *Kopin v. Orange Products, Inc.*, 297 *N.J. Super.* 353, 366 (App. Div.), *certif. denied*, 149 *N.J.* 409 (1997); *McClelland v. Tucker*, 273 *N.J. Super.* 410, 415 (App. Div. 1994).

The judicial role in reviewing the validity of a legislative districting plan is limited. *Davenport II*, *supra* (65 *N.J.* at 135). "Reapportionment is essentially a political and legislative process." *Ibid.* Accordingly, a redistricting plan "must be accorded a presumption of legality with judicial intervention warranted only if some positive showing of invidious discrimination or other constitutional deficiency is made. The judiciary is not justified in striking down a plan, otherwise valid, because a 'better' one, in its opinion, could be drawn." *Ibid.* (citing *Gaffney v. Cummings*, 412 *U.S.* 735, 93 *S. Ct.* 2321, 37 *L. Ed. 2d* 298 (1973)).

A central concept of the provisions of Article IV, § 2, ¶¶ 1-3 of our State Constitution is that "the Senate districts shall consist of one or more whole counties, whereas the Assembly districts shall be portions of a Senate district except where only one Senator is to be elected in the Senate district, in which event the Senate district and the Assembly district are coterminous." *Davenport v. Apportionment Comm'n*, 63 *N.J.* 433, 435 (1973) (*Davenport I*). Case law that followed enactment of the foregoing provisions resulted in significant changes to the way New Jersey's legislative districts are created using counties as building blocks. Thus, *Jackman v. Bodine*, 49 *N.J.* 406, 414-415 (1967), held that an alternative proposal that improved population equality ratios in the State's six southern counties by about 7% to 10% must be followed, even though that alternative required Gloucester County to be divided among two districts, which the county districting standard of Article IV, section 2, paragraph 3 prohibited unless necessary to meet contiguity, compactness, or population equality requirements. That decision also held that "notwithstanding the provisions of our State Constitution, the 80 Assemblymen must be apportioned among the Senate districts according to the equal-proportions method and without reference to the apportionment of the Senators." *Id.* at 417.

The Court's 1972 *Scrimminger* opinion was its "eleventh opinion dealing with apportionment under the one-man, one-vote doctrine" promulgated by *Reynolds v. Sims*, 377 *U.S.* 533, 84 *S. Ct.* 1362, 12 *L. Ed. 2d* 506 (1964). *Scrimminger*, *supra* (60 *N.J.* at 484-485). After reviewing Article IV, section 2's diverse methods for electing Senators, *Scrimminger* observed that the "command for adherence to county lines" generated the issue of population

inequality before it, and that the difficulty arose because there were twenty-one counties with substantial differences in population. *Id.* at 486-487.

In attempting to strike a balance between population equality and county line mandates, the Commission created a plan where the ranges of deviations from the ideal district were 28.83% for the Senate districts and 26.20% for the Assembly districts. *Id.* at 489. *Scrimminger* said that deviations of that magnitude were "invalid notwithstanding the stated purpose of the apportionment (*i.e.*, to adhere to county lines), and even though that purpose could not be satisfied by another arrangement involving lesser deviations." *Id.* at 493. Accordingly, *Scrimminger* held that the plan presented was invalid, and that "the mandate of our State Constitution with respect to adherence to county lines" could not be enforced "under the demographic pattern revealed by the 1970 census." *Id.* at 495. The Court added that "[s]ince the county cannot now serve as the basis of districting and since the multi-member district is contemplated in the Constitution only as an incident of county representation," Senate districts had to be single-member districts. *Id.* at 497.

However, *Scrimminger* continued: "[m]unicipal lines should be observed, if possible, for if they are followed, dividends may be expected in terms of furthering the relationship of these political subdivisions and the State and also in terms of restraining to some extent the opportunities for drawing lines for partisan advantage." *Id.* at 497-498. Thus, the Court held: "[m]unicipalities are thus appropriate building blocks for the creation of districts. The boundaries of the larger municipalities will of course have to be breached, and in this regard, the Commission

may have to depart from the direction in *Art.* 4, § II, ¶ 3, concerning the division of a municipality." *Id.* at 479. The Court added that although the requirements for contiguity and compactness would remain effective, compactness "may be of limited utility in the light of the odd configurations of our State and its municipalities." *Ibid.* (citing *Jackman*, *supra* (49 *N.J.* at 419)).

In affirming the judgment and returning the matter to the Commission for the preparation of a new plan, *Scrimminger* emphasized that it could not predict what range of deviation would be bad per se, writing that "there is no range of deviation within which a State may maneuver with or without reason. The constitutional command is to achieve equality, and hence a deviation may not exceed what an acceptable thesis of apportionment inevitably requires." *Ibid.* (citing *Jones v. Falcey*, 48 *N.J.* 25, 37 (1966)). The new plan was the subject of *Davenport I*, *supra* (63 *N.J.* 433). As the Supreme Court noted, the Appellate Division decision had expressed some doubts about whether *Scrimminger*'s pronouncements had to be followed strictly in light of the intervening opinion in *Mahan v. Howell*, 410 *U.S.* 315, 93 *S. Ct.* 979, 35 *L. Ed. 2d* 320 (1973), where the United States Supreme Court had allowed a 16.4% range of deviation where necessary to achieve important state goals. *Davenport I*, *supra* (63 *N.J.* at 435, 443-444). *Davenport I* noted that *Scrimminger* had determined that even while exceeding the range of deviation by more than 26%, New Jersey's stated goal of giving each county its voice in the Legislature could not be achieved. *Id.* at 440, 444.

Davenport I determined, therefore, that *Scrimminger*'s holding was intact, but considered a new concern: even though the *whole* county concept plan was not to be

followed, did the New Jersey Constitution require that a districting plan be drawn to adhere to as many county lines as possible? *Id.* at 446. The Court determined that the record was inadequate to address the question, and permitted the parties to file additional materials. *Id.* at 447-448.

Davenport II followed the submission of those additional materials. In *Davenport II*, *supra* (65 *N.J.* at 130-131), the Court reviewed the prior cases, including *Scrimminger*'s conclusion that

> decided that the foregoing State constitutional mandate with respect to using counties as building blocks could not be enforced under the demographic pattern, revealed by the 1970 census. As a result, the districting structure called for by present Article IV has been declared to be in violation of the Federal Constitution under the one-man, one-vote principle.
>
> [*Id.* at 132.]

The Court added a footnote to that final sentence: "New constitutional provisions for our State legislative structure would seem to be in order." *Ibid.* n.2. No such constitutional provisions were approved.

The argument in *Davenport II* was that the county unit was a political entity, so as many Senate districts as possible should be placed within whole counties as the New Jersey Constitution required. *Id.* at 132. The Court rejected this argument, stating:

> We find no such meaning in Article IV, nor do we think valid apportionment policy requires such result. On the contrary, we think it clear that attempting to preserve some semblance of

> county voting strength would create a plethora of constitutional problems. Were dilution of county voting strength a required consideration in applying one-man, one-vote, the degree of dilution would have to be considered and equalized along with population, a difficult if not impossible task to perform.
>
> We are satisfied that once the use of counties as building blocks was declared unenforceable, as it had to be under the demographic pattern shown by the 1970 census, the county concept ceased to have any viability in the creation of Senate districts.
>
> [*Id.* at 133.]

A wide disparity still remains between county populations.

Plaintiffs are correct in asserting that the case law to date did not expressly address the municipality districting standard. *Scrimminger* called municipalities the "appropriate building blocks for the creation of districts." Hence, any plan that ignored municipality boundaries would violate the Court's direction. The Court's statement that the "boundaries of the larger municipalities will of course have to be breached" was not a directive to abrogate the Constitution's municipality districting standard. The constitutional standard has two parts: it prohibits dividing a municipality among Assembly districts unless it contains more than one-fortieth of the state's population, and then it directs that no subdivision shall be among "a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State." *N.J. Const.* Art. IV, § 2, ¶ 3. Thus, the municipality districting standard applies only to

those municipalities that are larger than the ideal district population, which presently includes only Newark and Jersey City. As to each of them, the municipality districting standard calculation results in a maximum of two districts: for Newark, 1 + (the whole number resulting from 273,546 ÷ 210,359, which is 1.30), so 1+1=2; for Jersey City, 1 + (the whole number resulting from 240,055 ÷ 210,359, which is 1.14), so 1+1=2. Nothing could be clearer or more basic.

The only direction in any case as to the municipality districting standard was *Scrimminger*'s further statement that "in this regard, the Commission may have to depart from the direction in *Art.* 4, § II, ¶ 3, concerning the division of a municipality." *Scrimminger*, *supra* (60 *N.J.* at 498). Thus, there is clear merit to plaintiffs' position that this statement does not constitute clear direction that the provision has been abrogated.

The Commission's position that because the county districting standard and the municipality districting standard were set forth in the same constitutional provision, *Scrimminger* and *Davenport* resulted in abrogation of both standards is erroneous. Such an argument does not square with the Court's direction in those cases that although county lines could not be followed because of the mathematical inequities, the municipality lines should be, wherever possible, except for cities with populations above the ideal population by more than a few percentage points, which are only Jersey City and Newark. *Scrimminger*, *supra* (60 *N.J.* at 497-498).

The motion judge's conclusion that the municipality districting standard provision in our Constitution somehow had been abrogated relied upon the fact that *Davenport*

upheld a redistricting plan that had divided Newark and Jersey City into four and three legislative districts, respectively. However, the reported opinions did not address any variance from the municipality districting standard. In our earlier decision in *Davenport v. Apportionment Commission*, *supra* (124 *N.J. Super.* at 42), we had noted that the plan used municipalities "as building blocks, with necessary exceptions in the case of Newark and Jersey City" but this did not reflect any recognition or acceptance of the fact that Newark and Jersey City had been divided into more districts than the municipality districting standard would allow or rule on that issue. The *Davenport* plaintiffs resided in Union, Morris, and Passaic Counties, and their complaint challenged the apportionment of their home municipalities into districts largely comprised of municipalities in other counties. *Id.* at 34. *Davenport* made no mention of the undue fragmentation of Jersey City and Newark, nor even of the municipality districting standard; use of the county lines was the focus. *Davenport II*, *supra* (65 *N.J.* 125). Thus, there is no basis for concluding that the *Davenport* opinions allowed or affirmed a decision to deviate from our Constitution's municipality districting standard. The cases simply never addressed it. In any event, just because constitutional error was overlooked in the past neither makes the prior error right nor constitutional.

Thus, plaintiffs have met their burden by (1) showing that Jersey City and Newark were divided into three districts instead of two, and (2) drawing a map that apparently divided those cities into only two districts, and asserting that it complies with all federal and state districting requirements. Paramount is the one-person, one-vote principle of population equality. *Jackman*, *supra* (49 *N.J.* at 418). Summary judgment for defendants was hardly appropriate on the

basis of the record before the court. *See Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995).

No federal law expressly preempts the municipality districting standard and no State case has abrogated that standard. The federal Equal Protection Clause precludes basing districts upon race without regard for traditional redistricting principles. *Robertson*, *supra* (148 *F. Supp. 2d* at 453). The State Constitution requires contiguity, *Scrimminger*, *supra* (60 *N.J.* at 498), respect for municipal boundaries, *id.* at 497-498, and to a lesser degree, compactness. *Davenport II*, *supra* (65 *N.J.* at 133-134).

Plaintiffs are correct in asserting that the municipality districting standard remains a part of New Jersey constitutional law. The Constitution is our basic organic document that all State officials, including Judges, Legislators and the members of the Legislative Apportionment Commission take a solemn oath to uphold. The Constitution is neutral and blind to extraneous factors, and fully applies here, as it always has since adopted. The plain and unambiguous language of our State Constitution, which we are bound to apply, requires us to reverse and remand.

Accordingly, we reverse and remand to the Commission for preparation of a new redistricting plan in compliance with the Constitution municipality districting standard. The new plan would be applied prospectively.[6]

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[6] *Lonegan v. State*, 174 *N.J.* 354, 355 (2002) and 174 *N.J.* 435, 503 (2002) (Stein, J., concurring in part and dissenting in part).

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON PUBLICATIONS

ANNE M. MCNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DIGAETANO, AND KEVIN J. O'TOOLE,

Plaintiffs,

v.

LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DEFOREST B. SOARIES, SECRETARY OF STATE OF THE STATE OF NEW JERSEY, AND JOHN FARMER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Defendants.

Superior Court of New Jersey
Law Division: Mercer County

Docket No. MER-L-1442-01

OPINION

CIVIL ACTION

October 1, 2001

Kevin B. Riordan, Esq., argued the cause for plaintiffs (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys; Kevin B. Riordan on the brief)

Robert E. Levy, Esq., argued the cause for defendant Legislative Apportionment Commission (Scarinci & Hollenbeck, LLC, attorneys; Robert E. Levy, Esq., & Nomi I. Lowy, Esq., on the brief; and Sokol, Behot & Fiorenzo, attorneys; Leon J. Sokol, Esq., of counsel & on the brief, Steven Siegel, Esq., on the brief)

FEINBERG, A.J.S.C.

I.

BACKGROUND

Pursuant to Article 4, Section 2, Paragraph 1, of the New Jersey Constitution, after every decennial United States Census, a Legislative Apportionment Commission is created to establish Senate districts and Assembly districts and apportion the Senators and members of the General Assembly among them.[1] On March 8, 2001, the Governor received the official census numbers for New Jersey for the year 2000 ("Census"). Pursuant to the State Constitution, the Commission has one month after the receipt of the Census to certify, by a majority of the Commission's members, the establishment of Senate and Assembly districts and the apportionment of Senators and Assemblymen to the Secretary of State.

The record reflects that the Commission began negotiations, reached an impasse and was unable to certify the establishment and apportionment to the Secretary of State, pursuant Article 4, Section 3, Paragraph 1, of the New Jersey State Constitution. Consistent with Article 4, Section 3, Paragraph 2, of the New Jersey State Constitution, on March 27, 2001, Chief Justice Deborah Poritz appointed Dr. Larry Bartels as an eleventh member to the Commission. Upon appointment of an eleventh Commissioner, the Commission has until one month after the appointment to certify the establishment of Senate and Assembly districts and the apportionment of

[1] The Commission consists of ten members, five appointed by the Chairman of the Democratic State Committee and five appointed by the Chairman of the Republican State Committee.

Senators and Assemblymen to the Secretary of State. N.J. Const. art. IV, § 3, ¶ 2.

On April 11, 2001, the Commission, by a six to one vote, approved the reapportionment and redistricting plan. The only Republican member present for the vote was the Senate Majority Leader, John Bennett. The other four Republican members were not present for the vote. The five Democratic members and the eleventh member voted to adopt the plan and Senator Bennett voted to reject the plan.

A verified complaint and an application for an order to show cause with restraints was filed on May 9, 2001, by plaintiffs Anne McNeil, a resident and registered voter of Jersey City, Thomas Williams, a resident and registered voter of Newark, Roseanna Siebert, a resident and registered voter of the Borough of Bergenfield, Paul DiGaetano, a resident and registered voter of Nutley, and an incumbent Assemblyman in the 36th Legislative District, and Kevin O'Toole, a resident and registered voter of the Township of Cedar Grove and a New Jersey Senator representing the 21st Legislative District.[2] The complaint

[2] The court notes that on February 20, 2001, James Curcio filed a complaint against the Commission challenging the division of Atlantic County into more than two legislative districts. Plaintiff sought an order requiring the Commission to divide the municipalities of Atlantic County into "no more than two legislative districts," pursuant Article 4, Section 2, paragraph 3 of the New Jersey State Constitution. By motion, the matter was transferred from Atlantic County to Mercer County. Subsequently, the Commission filed a motion to dismiss for failure to state a claim. On April 12, 2001, plaintiff's filed a Notice of Appeal and a Notice of Motion for Accelerated Consideration of Appeal, with the Appellate Court. On April 17, 2001, the Honorable Harold B. Wells, III, J.A.D., denied the motion to accelerate the plaintiffs appeal,

(Continued on following page)

named the Legislative Apportionment Commission of the State of New Jersey ("Commission"), DeForest B. Soaries, Secretary of State of New Jersey ("Secretary"), and John Farmer, Attorney General of New Jersey ("Attorney General"), as defendants.

In the complaint, the plaintiffs assert that the apportionment and redistricting plan violates Article 4, Section 2, Paragraph 3 of the New Jersey State Constitution based on the following: (1) the plan divides the residents of Jersey City into three legislative districts;[3] (2) the plan divides the residents of Newark into three legislative districts;[4] (3) the plan divides the residents of Borough of Bergenfield into two legislative districts[5] or, alternatively, if Bergenfield is determined to be located solely in the 37th Legislative district, a portion of the Borough is completely surrounded by the municipality of Dumont which is located in the 39th Legislative District; and (4) the plan is biased and dilutes minority

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finding that "the record of the Legislative Apportionment Commission's action insufficient for appellate." The court remanded the matter to the Law Division, Mercer County for consolidation with the matter of *Curcio v. The Legislative Apportionment Commission of the State of New Jersey,* Docket No. MER-L-001076-01, to construct a record at a plenary hearing or such other proceeding as the Law Division may deem, in its discretion, appropriate and to render findings and conclusions. This court denied an application for injunctive relief and permitted the parties to conduct limited discovery. On subsequent cross-motions for summary judgment, summary judgment was entered in favor of the defendant.

[3] The Plan divides Jersey City into the 31st, the 32nd, and the 33rd Legislative Districts.

[4] The Plan divides Newark into the 27th, the 28th, and the 29th Legislative Districts.

[5] The Plan places Bergenfield into the 37th Legislative District.

biased and dilutes minority representation because it does not comply with the apportionment criteria established by the Eleventh member of the Commission.[6]

For the reasons set forth in the record, on May 9, 2001, this court denied plaintiffs' request for injunctive relief. Thereafter, the court signed a case management order that established a period of limited discovery and a briefing schedule.[7]

Challenging the decision by this court denying injunctive relief, on May 11, 2001, plaintiffs filed a notice of motion for leave to file an interlocutory appeal, on an emergent basis with the Appellate Division. Plaintiffs raised the following issues on appeal:

> (1) The defendant[s] should be temporarily restrained and enjoined from utilizing the apportionment plan adopted by a majority of the state apportionment commission in any legislative elections because it violates Article IV, Section 2, Paragraph 3 of the New Jersey Constitution. (A) The Apportionment Commission should be temporarily restrained and enjoined from using the apportionment plan in any legislative elections

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[6] Count Four, as amended, states "the apportionment criteria utilized by the eleventh member, Larry Bartels, in formulating the apportionment plan, was applied in a biased and unfair manner so as to penalize incumbent legislators including certain minority legislators."

[7] On May 25, 2001, the court signed an order setting a period for discovery ending July 13, 2001. The order required parties to file cross-motions for summary judgment by July 27, 2001, required parties to file replies by August 3, 2001, and set August 10, 2001 as the date for oral argument. Oral argument was subsequently adjourned until September 21, 2001.

as it fragments the municipalities of Newark and Jersey City among an inappropriate number of legislative districts in violation of Article IV, Section 2, Paragraph 3 of the New Jersey Constitution. (B) The defendant apportionment commission should be temporarily restrained and enjoined from using the apportionment plan in any legislative elections because it violates the contiguity requirements of Article IV, Section 2, Paragraph 3 of the New Jersey Constitution.

(2) The plaintiff/appellants have demonstrated all of the elements necessary for the issuance of a preliminary injunction.

(3) The Appellate Division should decide this matter on an accelerated basis pursuant to Rule 2:9-2. In the interim, the Appellate Division should grant temporary relief in the form of restraints pursuant to Rule 2:9-8.

The Appellate Division denied the aforementioned relief on May 14, 2001. Plaintiffs' subsequent application to the Supreme Court was denied on May 16, 2001.

II.

LEGAL ISSUES

A.

STANDARD OF REVIEW

The role of the court, when reviewing a redistricting plan certified by the Commission, is strictly defined and limited. The New Jersey Supreme Court explained the limited role of the court in *Davenport v. Apportionment Comm'n,* 65 *N.J.* 125 (1974):

> The judicial role in reviewing the validity of such a plan is limited. Reapportionment is essentially a political and legislative process. *The plan must be accorded a presumption of legality with judicial intervention warranted only if some positive showing of invidious discrimination or other constitutional deficiency is made. The judiciary is not justified in striking down a plan, otherwise valid, because a "better" one, in its opinion, could be drawn.*
>
> [*Id.* at 135 (citing *Gaffney v. Cummings,* 412 *U.S.* 735, 93 *S.Ct.* 2321, 37 *L. Ed. 2d* 298 (1973) (emphasis added).]

In *Davenport* the court recognized that "reapportionment is essentially a political and legislative process," and, as such, courts must apply a deferential standard of review. *Ibid.* Against this backdrop, any challenges to a redistricting plan must be examined by the court using this standard of review, and the court may only intervene in the "legislative process" of creating the plan when invidious discrimination or constitutional deficiency has been proven. Importantly, the burden is on the plaintiff to establish "some positive showing of invidious discrimination or other constitutional deficiency" before the court may invalidate any portion of the plan.

As will be detailed at length in this opinion, the plaintiffs have failed to meet this burden.

B.

THE FRAGMENTATION OF NEWARK AND JERSEY CITY INTO MORE THAN TWO LEGISLATIVE DISTRICTS

In Counts One and Two, plaintiffs contend that the fragmentation of Newark and Jersey City into more than two legislative districts each violates Article 4, Section 2, Paragraph 3 of the New Jersey Constitution. Recognizing that the New Jersey Constitution requires municipalities that exceed one-fortieth of New Jersey's population to be divided into more than one legislative district, plaintiffs submit that the Commission was constitutionally constrained to place Newark and Jersey City into no more than two legislative districts each.[8]

In support of this position, the plaintiffs rely on the language set forth in Article 4, Section 2, Paragraph 3 that provides that a municipality may not be divided between a number of districts exceeding the sum of one plus the whole number obtained by dividing the number of inhabitants in a municipality by one-fortieth of the total number of inhabitants in the State of New Jersey. It is undisputed that the apportionment plan divides Newark into three

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[8] It is undisputed that, as indicated by the 2000 census, New Jersey has a total population of 8,414,350. As such, the ideal legislative district should contain 210,359 inhabitants. The New Jersey Constitution allows a municipality to be divided into more than one legislative district when its population exceeds 210,359 inhabitants, or one-fortieth of the population of New Jersey. The 2000 census indicates that Newark contains 273,546 inhabitants, exceeding one-fortieth of the State's total population by 63,187 persons and Jersey City contains 240,055 inhabitants, exceeding one-fortieth of the State's population by 29,696.

different legislative districts, the 27th, 28th, and 29th districts and Jersey City into the 31st, 32nd and 33rd districts.

In response, the defendants submit that although the Supreme Court in *Scrimminger v. Sherwin,* 60 *N.J.* 483 (1972) observed that municipalities were appropriate "building blocks" for the creation of districts, the Court recognized that:

> The boundaries of larger municipalities *will of course have to be breached,* and in this regard, the Commission may have to depart from the direction of Art. 4, Section II, Paragraph 3, concerning the division of a municipality.
>
> [*Id.* at 498 (emphasis added).]

In the alternative, defendants assert that even if Paragraph 3 has not been abrogated by subsequent case law, the plan satisfies the requirements of population equality, contiguity, compactness, and federal statutory requirements, and the decision to apply the Article 4 formula is within the discretion of the Commission. Finally, defendants submit: (1) that the record is void of any evidence to establish that the division of Newark and Jersey City into three legislative districts each is the result of invidious discrimination on the part of the Apportionment Commission; or (2) that the plan contains any constitutional deficiencies within the meaning of *Davenport* and in light of *Scrimminger.*

At issue in the case at bar is Article 4, Section 2, Paragraph 3 of the New Jersey Constitution, which contains a formula to be utilized in reapportioning legislative districts in the State after every official decennial census. In its entirety, the provision reads:

> The General Assembly shall be composed of eighty members. Each Senate district to which only one senator is apportioned shall constitute an Assembly District. Each of the remaining Senate districts shall be divided into Assembly districts equal in number to the number of senators apportioned to the Senate district. The Assembly districts shall be composed of contiguous territory as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eight percent of one-fortieth of the total number of inhabitants of the State as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last, preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the state, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants in the State.
>
> [*N.J.* Const. art. IV, § 2, ¶ 3.]

In *Jackman v. Bodine,* 49 *N.J.* 406 (1967), the Court held that the apportionment of Assembly districts mechanically by allocating two Assembly members for each Senator and without reference to population equality violated the United States Constitution. *Id.* at 417. The *Jackman* Court held:

> . . . notwithstanding the provisions of our State Constitution, the 80 Assemblymen must be apportioned among the Senate districts according to the equal proportions method and without reference to the apportionment of Senators.

[*Jackman v. Bodine,* 49 *N.J.* at 417.]

Five years after *Jackman,* the Court in *Scrimminger v. Sherwin,* 60 *N.J.* 483 (1972), significantly modified Article 4, Section 2, Paragraph 3. In essence, the Court held that the plan was inherently incompatible with the Federal Constitution. First, the Court invalidated that portion that provided that "no Assembly district shall contain less than eighty per cent nor more than one hundred and twenty per cent of one-fortieth of the total number of inhabitants." *Id.* at 489. Holding that our constitutional provisions must give way to the requirements of the Federal Constitution as construed by the United States Supreme Court in *Reynolds v. Sims,* 377 *U.S.* 533, 84 *S. Ct.* 1362, 12 *L.Ed. 2d* 506 (1964), the Court made it abundantly clear that population equality must be distinctly paramount.

Second, the Court determined that legislative districts had to be drawn without reference to counties. *Id.* at 492. Parts of the decision are noteworthy:

> At any rate, decisions of the United States Supreme Court since then persuasively show that such deviations cannot be upheld and *indeed our State's Constitution mandate for adherence to county lines cannot be followed* under the present population distribution in our State.

[*Scrimminger,* 60 *N.J.* at 492 (emphasis added).]

Departing from the specific language in Article 4, Section 2, Paragraph 3 the Court explained its reasons for abrogating adherence to county lines by noting:

> The first is that the supposed justification for adhering to county lines cannot be realized. The principal justification for the deviations is the public advantage gained by assuring each county a separate voice in its relations with the State. That objective is not achieved in the present plan since only 10 of the 21 counties are represented by Senators elected by the voters of the county . . . The second consideration militating against the value of adhering to county lines is the phenomenon of the multimember district. Of the 10 counties which severally elect their Senators, eight elect between two and five Senators at large rather than within sub-senate districts. Thus 8 of the 21 counties have multiple voices in the Senate . . . .
>
> [*Id.* at 495-496.]

Third, emphasizing the requirement that a plan must satisfy the one-person, one-vote concept of population equality, the Court concluded that legislative districts must be single-member districts, thereby eliminating the distinction between Senate and Assembly districts in Article 4, Section 2, Paragraph 3. *Id.* at 492.

Finally, although the Court determined that municipalities were, appropriate "building blocks" for the creation of legislative districts, the Court stated:

> The boundaries of the larger municipalities will of course have to be breached, and in this regard, the Commission may have to depart from the

> direction in Art. 4, Section II, Paragraph 3, concerning the division of a municipality.[9]
>
> [*Id.* at 498.]

Two years after *Scrimminger,* the Court in *Davenport v. Apportionment Commission,* 65 *N.J.* 132 (1974) reaffirmed the finding that Article 4, Section 2, Paragraph 3 with respect to using counties as building blocks could not be enforced under the demographic pattern, revealed by the 1970 census in as much as the plan violated the Federal Constitution and the one-man, one vote principle. In *Davenport,* the court addressed the issue of whether, although the whole-county concept no longer was viable, Article 4 of the New Jersey Constitution required adherence to county lines to the extent possible, i.e. placing as many Senate districts as possible within whole counties.

Responding to that question, the Court made it clear that it did not and held:

> We find no such meaning in Article IV, nor do we think valid apportionment policy requires such result. On the contrary, we think it clear that attempting to preserve some semblance of county voting strength would create a plethora of constitutional problems, Were dilution of county voting strength a required consideration in applying one-man, one-vote, the degree of dilution would have to be considered and equalized along with population, a difficult if not impossible task to

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[9] The court also held that the requirement of compactness remained but concluded " . . . compactness may be of limited utility in light of the odd configuration of our State and its municipalities." *Id.* at 498.

> perform. We are satisfied that once the use of counties as building blocks was declared unenforceable, as it had to be under the demographic pattern shown by the 1970 census, the county concept ceased to have any viability in the creation of Senate districts.
>
> [*Id.* at 133.]

Accordingly, apportionment commissions have created reapportionment plans without regard to the county-line provision set forth in Article 4, Section 2, Paragraph 3, yielding to the population equality concerns as articulated in *Reynolds v. Sims,* 377 *U.S.* at 575, 84 *S.Ct.* at 1388.

It thus logically follows that the *Scrimminger* Court, in abrogating the county-line provision of Article 4, Section 2, Paragraph 3, also abrogated the portion of Paragraph 3 governing the division of larger municipalities. The very structure and language of the *Scrimminger* decision leads to this conclusion. In the same paragraph in which the *Scrimminger* Court enunciated its holding that "the county cannot now serve as the basis of districting . . . " the Court stated, "[t]he boundaries of the larger municipalities *will of course have to be breached,* and in this regard, the Commission may have to depart from the direction of Art. 4, Section II, Paragraph 3, concerning the division of a municipality." *Scrimminger,* 60 *N.J.* at 498 (emphasis added). This provision, like the county-line provision, thus ceases to have any viability in New Jersey's reapportionment scheme.

In the case at bar, plaintiffs contend that although Newark and Jersey City, as municipalities with populations exceeding one-fortieth the total inhabitants of the

State may be divided into two legislative districts, defendant Commission improperly divided the cities into more than two districts. There is nothing in the language of *Scrimminger* or *Davenport* preventing a reapportionment commission from, in an effort to satisfy the paramount concern of population equality and the myriad of other important statutory and constitutional requirements, dividing a larger municipality into more than two districts.

Other than the challenge to the division of Newark and Jersey City, the record is void of any evidence, and the plaintiffs have not alleged, that the plan adopted by the Commission is unconstitutional or improper. Importantly, the record discloses that: (1) the plan certified by the Commission satisfies the paramount consideration of population equality and the one-person, one-vote principle of *Reynolds v. Sims* and its progeny, which the United States Supreme Court has repeatedly determined is the paramount concern in legislative redistricting. *See Reynolds v. Sims,* 377 *U.S.* 533, 84 *S.Ct.* 1362, 12 *L.Ed. 2d* 506 (1964); (2) the plan certified by the Commission satisfies the requirement of contiguity; (3) the plan certified by the Commission satisfies the requirement of compactness; (4) the plan certified by the Commission adheres to the boundary lines of smaller municipalities; and (5) there is no evidence in this record of invidious discrimination or other violation of federal or constitutional or statutory mandates.

Since the adoption of Article 4, Section 2, Paragraph 3 in 1966, decisions by the Supreme Court of the United States and of the State of New Jersey have resulted in the dramatic modification of the formula set forth in Article 4,

Section 2. Referring to its decision in *Jackman v. Bodine,* 53 *N.J.* 585 (1967), the Court in *Scrimminger* noted:

> [D]ecisions of the United States Supreme Court since then persuasively show that such deviations cannot be upheld and indeed that our Constitution's mandate for adherence to county lines cannot be followed under the present population distribution in our State.
>
> [*Scrimminger,* 60 *N.J.* at 492.]

Following that same theme, in *Davenport v. Apportionment Commission of the State of New Jersey,* 124 *N.J. Super.* 30 (App. Div. 1973), the court noted the following:

> Last year our Supreme Court once again considered the entire system of legislative representation in this State, however, and concluded that sweeping changes were necessary to insure that the legislative districts would conform to the increasingly rigid one-man, one-vote principle as further developed by the federal Supreme Court. The court ordered that after 1973 all senators represent single-member districts and that two assemblymen be allotted to each of these districts. It further ordered the Apportionment Commission to draw these lines without regard to county boundaries, paying attention only to substantial equality of population, municipal boundaries, contiguity and, to a limited extend [sic], the constitutional requirement of compactness.
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> [*Davenport,* 124 *N.J. Super.* at 39 (*citing Scrimminger,* 60 *N.J.* at 483).]

All four decennial censuses since 1966 have divided Newark and Jersey City into more than two legislative districts. Interestingly, despite numerous challenges to the

legislative districts certified after each census, not a single plan has been struck down based on the division of Newark and Jersey City. When the 1970 census was challenged, the Court held that a plan, that divided Newark into four legislative districts and Jersey City into three legislative districts, did not violate either the Federal or State Constitution.

The assertion by the plaintiffs that no court has ever specifically addressed the division of Newark and Jersey City each into more than two legislative districts is without merit. To the contrary, the plan redrawn by the Commission after the *Scrimminger* decision came before the court in 1973. *See Davenport,* 124 *N.J. Super.* at 30. Significantly, the plan redrawn by the Commission divided Newark into four legislative districts and Jersey City into three legislative districts. Referring specifically to the City of Newark and Jersey City, the Appellate Division in *Davenport* noted:

> The Commission followed the *Scrimminger* directive to use municipalities as building blocks, with the necessary exceptions in the case of Newark and Jersey City.
>
> [*Davenport,* 124 *N.J. Super.* at 42.]

Importantly, the Supreme Court in 1974 upheld the plan and held:

> We conclude that the Commission plan adequately carries out the mandate of *Scrimminger* and has not been shown to be in violation of any State or Federal constitutional standard.
>
> [*Davenport*, 65 *N.J.* at 135 (emphasis added).]

This language makes it abundantly clear that the Court considered the division of Newark and the Jersey City into more than two legislative districts.

Similarly, in *Page v. Bartels,* 144 *F. Supp. 2d* 346 (D.N.J. 2001), the court approved the current reapportionment plan that divided Newark and Jersey City each into three legislative districts. Importantly, the court recognized the need to exempt Newark and Jersey City from the formula set forth in Article 4, Section 2 Paragraph 3. The court addressed and approved the eight criteria considered by Dr. Bartels in the development of an appropriate plan. These included:

> (1) minimizing the population deviations among the districts, as required by the "one person, one vote" rule; (2) keeping each of the forty districts contiguous; (3) keeping each of the forty districts reasonably compact; (4) *respecting municipal boundaries by not splitting any towns other than Newark and Jersey City (which are too large to fit in one legislative district)*; (5) respecting voting-district boundaries; (6) avoiding any bias in the map that might favor one political party over the other in an election year when the two parties were tightly competitive; (7) ensuring that some seats were competitive so that the composition of the Legislature would be responsive to shifts in votes from one party to another; and (8) minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote.
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> [*Id.* at 368 (emphasis added).]

While our courts have held that Newark and Jersey City are "necessary exceptions" from the Article 4, Section 2, Paragraph 3 prohibition on dividing municipalities into

multiple legislative districts, they have never suggested that the division of smaller municipalities is appropriate. As such, this court interprets *Scrimminger* and its progeny as abrogating Article 4, Section 2, Paragraph 3 only in reference to municipalities with populations exceeding one-fortieth of the State's total number of inhabitants. *Scrimminger* does not provide the reapportionment commission with unbridled discretion to divide municipalities regardless of their population, as it recognized that as a general rule, municipalities are appropriate "building blocks" for the creation of legislative districts. It is only when a municipality's size makes it a "necessary exception" that the commission is warranted in dividing the municipality into more than one legislative district.

Significantly, the holding in *Scrimminger* has become even more compelling based on subsequent decisions of the United States Supreme Court that have expanded and recognized new rights under the Fourteenth Amendment and the Voting Rights Act that apply to the redistricting process. *See e.g., Shaw v. Reno,* 509 *U.S.* 630, 113 *S.Ct.* 2816, 125 *L.Ed. 2d* 511 (1993) (recognizing that the Fourteenth Amendment proscribes racial gerrymandering); *Rogers v. Lodge,* 458 *U.S.* 613, 102 *S.Ct.* 3272, 73 *L.Ed. 2d* 1012 (1982) (recognizing that purposeful minority vote dilution is a violation of the Fourteenth Amendment); *Davis v. Bandemere,* 478 *U.S.* 109, 106 *S.Ct.* 2797, 92 *L.Ed. 2d* 85 (1986) (recognizing the potential justicability of racial gerrymandering under the Fourteenth Amendment); *Thornburg v. Gingles,* 478 *U.S.* 30, 106 *S.Ct.* 2752, 92 *L.Ed. 2d* 25 (1986) (construing and applying Section 2 of the Voting Rights Act, 42 *U.S.C.* §1973). These newly recognized rights under the Fourteenth Amendment and under federal statutes mean that the *Scrimminger* Court's

subordination of Article 4 to the dictates of federally recognized rights have become even more compelling and is made even more necessary.

C.

THE BOROUGH OF BERGENFIELD

Count Three alleges that the plan adopted by defendant Commission: (1) divides the residents of the Borough of Bergenfield between two legislative districts, the 37th and 39th in violation of Article 4, Section 2, Paragraph 3 of the New Jersey Constitution; or, (2) in the alternative, if Bergenfield is located solely in the 37th legislative district, a portion of Bergenfield is completely surrounded by the municipality of Dumont, which is located in the 39th legislative district and thus violates the contiguity requirements of the New Jersey Constitution.[10] Plaintiffs have failed to offer any certifications or documentary evidence to support these allegations.

The record on summary judgment conclusively establishes that the Borough of Bergenfield is situated entirely within the 37th District. Furthermore, defendants have submitted the certification of James Feury, Borough Engineer of the Borough of Bergenfield, and a copy of the Borough of Bergenfield official tax map. Mr. Feury certifies that the Borough of Bergenfield is composed entirely of contiguous territory and that it is possible for a person

[10] Plaintiffs allege that the area of Bergenfield north of Twin Boro Lane ("Twin Borough North Area") is noncontiguous with the remainder of the Borough and is completely surrounded by the Borough of Dumont.

to travel from any point within Bergenfield to any other point in Bergenfield without leaving the Borough.[11]

D.

EQUAL PROTECTION CLAIM

Count Four, as amended, alleges a violation of the Equal Protection Clause of the 14th Amendment by stating "the apportionment criteria utilized by the eleventh member, Larry Bartels, in formulating the apportionment plan, was applied in a biased and unfair manner so as to penalize incumbent legislators including certain minority legislators." In response, the defendants assert that plaintiffs have failed to offer any expert or fact witnesses to support these allegations. The record reflects that in answers to interrogatories, the plaintiffs have not offered the names of any witnesses who may have knowledge regarding the alleged bias of the plan or the alleged violations of the New Jersey Constitution or offered any documentary evidence to support these allegations. Finally, the defendants represent that the United States District Court for the District of New Jersey has twice upheld the validity of the plan and determined that the plan does not violate the Equal Protection Clause, citing

---

[11] Specifically, Mr. Feury certifies that the Twin Borough North Area of Bergenfield is contiguous with the remainder of Bergenfield as evidenced by the official tax map. The map indicates that a strip of land wholly within the Borough of Bergenfield connects the Twin Borough North Area of the Borough with the remainder of Bergenfield and that this strip of land traverses Twin Boro Lane to the immediate west of the eastern boundary of Twin Boro Lane.

Page v. Bartels, 144 *F. Supp. 2d* 346 (D.N.J. 2001) and *Robertson v. Bartels,* 148 *F. Supp. 2d* 443 (D.N.J. 2001).

In *Page,* the three-judge panel, following a two-day trial, made the following findings of fact and conclusions of law:

> Race *per se* was not the predominant motive in the approval of the Bartels plan. Rather, the Bartels plan was adopted based on a variety of factors, most notably the doctrine of political fairness, Constitutional and statutory requirements, and the concerns of minorities.

[*Page,* 144 *F. Supp. 2d* at 368.]

The *Page* Court then determined that the evidence submitted did not support a claim of violation of the Equal Protection Clause. Similarly, the three-judge panel in *Robertson* determined:

> While the Commission certainly considered race in selecting the plan, its use was permissible and was not the predominant factor in the adoption of the redistricting plan. Accordingly, the plaintiffs have failed to substantiate a claim of racial gerrymandering in violation of the Equal Protection Clause . . .

[*Robertson,* 148 *F. Supp. 2d* at 458.]

Plaintiffs have failed to allege with particularity any biased or unfair behavior by defendant Commission that resulted in discrimination against incumbent minority senators. The sole reference to a minority incumbent Senator is a statement in the complaint that plaintiff, Kevin O'Toole, is the first New Jersey legislator of Asian

descent. This statement, standing alone, does not support an Equal Protection Claim.

As noted heretofore, the United States District Court for the District of New Jersey has on two separate occasions held that the reapportionment plan approved by defendant Commission does not violate the Equal Protection Clause. Significantly, both of these decisions rejected the notion that the reapportionment plan was applied in a biased and unfair manner so as to penalize incumbent legislators including certain minority legislators. *See Page,* 144 *F. Supp. 2d* at 362 and *Robertson,* 148 *F. Supp. 2d* at 459. Finally, irrespective of the decisions reached in *Pace* and *Robertson,* the plaintiffs have failed to produce a scintilla of evidence to establish a threshold finding based on 14th Amendment grounds.

III.

CONCLUSION

To grant a motion to enter summary judgment, the moving party must show that there is no genuine issue of material fact in the case, and that they are entitled to judgment as a matter of law. *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67, 73 (1954); *R.* 4:46-2. A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 523 (1995). In addition, the court must consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of

the non-moving party. *Brill*, 142 *N.J.* at 523. The key in this analysis is for the motion judge to determine whether there is sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law. *Id.* at 533.

In the case of a challenge to a redistricting plan, courts have properly found summary judgment appropriate in cases where the issues presented were only questions of law. *See Robertson v. Bartels,* 148 *F. Supp. 2d* 443 (D.N.J. 2001).

This court is satisfied that the only real issues in the case at bar are legal in nature. Accordingly and for all the reasons set forth heretofore, summary judgment is granted in favor of the defendant.

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ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO and KEVIN J. O'TOOLE

Plaintiff,

vs.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DEFOREST B. SOARIES, Secretary of State of New Jersey, and JOHN FARMER, Attorney General of New Jersey

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY DOCKET NO. MER-L-1442-01

Civil Action

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 12, 2001)

THIS MATTER having been brought before the Court on cross motions for summary judgment filed by the parties, Kevin B. Riordan, Esq. (Berry, Kagan, Sahradnik, Kotzas & Riordan) appearing and arguing for Plaintiffs, Robert E. Levy, Esq. (Scarinci & Hollenbeck, L.L.C.) appearing and arguing for Defendant Legislative Apportionment Commission of the State of New Jersey, and the Court having considered the arguments of counsel and good cause having been shown, and for the reasons set forth in this Court's written Opinion dated October 1, 2001;

IT IS on this 12th day of October, 2001

ORDERED that Defendant's motion for summary judgment is hereby granted and judgment is hereby entered in favor of Defendants and against Plaintiffs; and it is

FURTHER ORDERED that Plaintiffs' motion for summary judgment is hereby denied; and it is

FURTHER ORDER that Plaintiffs' claims are hereby dismissed in their entirety with prejudice; and it is

FURTHER ORDERED that a copy of this Order shall be served upon all counsel of record within 10 days of the date hereof.

/s/ Linda R. Feinberg
Honorable
Linda R. Feinberg, A.J.S.C.

_X_ Opposed

___ Unopposed

SUPREME COURT OF NEW JERSEY
M-1123/1124 September Term 2000

ANNE M. McNEIL, et al.,

Plaintiffs-Movants,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, et al.,

Defendants-Respondents.

ORDER
(Filed May 16, 2001)

This matter having been duly presented to the Court, it is ORDERED that the motions for leave to appeal (M-1123) and for temporary restraints (M-1124) are denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 16th day of May, 2001.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

ORDER ON EMERGENT APPLICATION

ANNE M. McNEILL, THOMAS E. WILLIAMS, ROSEANNE SIEBERT, PAUL DiGAETANO and KEVIN J. O'TOOLE,

Plaintiffs,

vs.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DeFOREST B. SOARIES, Secretary of State of New Jersey, and,

Defendants,

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO.
MOTION NO.
PART: D
JUDGE (S):
BAIME
WALLACE, JR.
CARCHMAN

EMERGENT APPLICATION FILED: May 11, 2001

ANSWER(S) FILED: May 14, 2001

APPEARANCE ONLY:

BY: John C. Sahradnik, Esquire

BY: DAG Donna Kelly
Robert E. Levy, Esquire
Leon Sokol, Esquire

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 14TH DAY OF MAY, 2001, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
EMERGENT APPLICATION FOR NOTICE OF MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL AND FOR A SUMMARY REVERSAL OF THE ORDER DENYING TEMPORARY RESTRAINTS; FOR AN ACCELERATED DISPOSITION PURSUANT TO RULE 2:9-2; FOR IMMEDIATE TEMPORARY RELIEF PURSUANT TO RULE 2:9-8; and NOTICE OF MOTION TO SUPPLEMENT THE RECORD.	( )	(X)	(X)

SUPPLEMENTAL:

All motions are denied.

FOR THE COURT:

/s/ Philip S. Carchman
PHILIP S. CARCHMAN, J.A.D.

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ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO and KEVIN J. O'TOOLE, Plaintiffs v. THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DEFOREST B. SOARIES, Secretary of State of New Jersey, And JOHN FARMER, Attorney General of New Jersey Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY Docket No. L-1442-01 Civil Action **ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS** (Filed May 9, 2001)

This matter having been brought before the Court on the application of Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys for the Plaintiffs, for the entry of an Order to Show Cause why an injunction should not be entered enjoining all Defendants, including the Secretary of State of the State of New Jersey, and the Attorney General of the State of New Jersey, from employing, ratifying, certifying or otherwise giving any effect, directly or indirectly, to the apportionment plan, approved by a majority of the Defendant, Legislative

Apportionment Commission of the State of New Jersey, on April 11, 2001; and the Court having considered the Verified Complaint and the Brief supporting Plaintiffs' application, the brief(s) filed, and the arguments of counsel, and for good cause shown;

IT IS on this 9th day of May, 2001

[Five paragraphs lined out and marked as denied by Judge Linda R. Feinberg.]

/s/ Linda R. Feinberg
A.S.S.C.

[Reasons for Denial pursuant to R. 4:52-5. Plaintiffs failed to establish immediate & irreparable harm; probability of success on the merits of an entitlement to relief by the balancing of the respective interests of the plaintiffs & defendants. In regards briefing schedule and discovery order shall be submitted under separate cover by counsel for the defendants. Reasons for denial set forth in detail in official record this date.]

Article IV, section 2 of the New Jersey Constitution provides as follows:

> 1. The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.
>
> 2. Each senator shall be elected by the legally qualified voters of the Senate district, except that if the Senate district is composed of two or more counties and two senators are apportioned to the district, one senator shall be elected by the legally qualified voters of each Assembly district. . . . [omitting provision about when senators' terms begin and end].
>
> 3. The General Assembly shall be composed of eighty members. Each Senate district to which only one senator is apportioned shall constitute an Assembly district. Each of the remaining Senate districts shall be divided into Assembly districts equal in number to the number of senators apportioned to the Senate district. The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no

county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the state, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

[*N.J. Const.* Art. 4, § 2, ¶¶ 1-3.]

The Federal Voting Rights Act 42 U.S.C.A. § 1973,

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
FILED
DEC 1 _ 2003
OFFICE OF THE CLERK

(2)

No. 03-652

IN THE

Supreme Court of the United States

ANNE M. MCNEIL, *et al.*,
Petitioners,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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QUESTION PRESENTED

Whether this Court has jurisdiction to hear this case, in which the opinion of the state court below sets forth two independent and adequate state-law grounds in support of its judgment dismissing Petitioners' claim.

PARTIES TO THE PROCEEDING

Petitioners are Anne M. McNeil, Thomas E. Williams, Roseanna Siebert, Paul DiGaetano, and Kevin J. O'Toole. Respondents are the Legislative Apportionment Commission of the State of New Jersey; Regina L. Thomas, Secretary of State of New Jersey; and Peter C. Harvey, Attorney General of New Jersey.

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N.J. Const. art. IV, § 2, ¶ 4 3

STATEMENT

This is a legislative apportionment case. Petitioners seek review of a decision of the New Jersey Supreme Court construing a provision of the New Jersey Constitution that pertains to the division of the State's two largest municipalities (Newark and Jersey City) into legislative districts. *See* N.J. Const. art. IV, § 2, ¶ 3. The New Jersey Supreme Court held that the state constitutional provision was unenforceable, both by operation of the Supremacy Clause and by operation of independent state-law principles. *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 400, 828 A.2d 840, 862 (2003), Pet. App. 1a-40a. Because the New Jersey Supreme Court's decision was expressly based on independent state-law grounds as well as on the federal ground on which Petitioners rely, this Court lacks jurisdiction to review the matter.

In the proceedings below, Petitioners sought invalidation of the New Jersey Legislative Apportionment Plan (the "Plan") on the ground that it divided Newark and Jersey City into three legislative districts each, rather than two, which would be the maximum permitted under the plain text of Article IV, Section 2, Paragraph 3, of the New Jersey Constitution. The New Jersey Supreme Court rejected Petitioners' argument, upheld the Plan, and held that Article IV, Section 2, Paragraph 3, of the New Jersey Constitution was unenforceable for three separate and independent reasons. *McNeil*, 177 N.J. at 374-400, 828 A.2d at 845-62, Pet. App. 6a-40a.

First, the court below held that the New Jersey constitutional provision, even if otherwise viable, was preempted by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The court determined that "[t]o now create two

districts each in Newark and Jersey City [as directed by Article IV, Section 2, Paragraph 3, of the New Jersey Constitution] would, in the Commission's view and supported by the record, constitute packing [of minority voters] in violation of Section 2 of the [Voting Rights Act]." *McNeil*, 177 N.J. at 384, 828 A.2d at 852, Pet. App. 19a. The court also concluded that enforcement of Article IV, Section 2, Paragraph 3, of the New Jersey Constitution would have the effect of "depriving the Commission of the 'unpacking' tool[, which] would constitute an undue restraint on its reapportionment planning in contravention of the aims and policies of the [Voting Rights Act]." *Id.* The court determined that Article IV, Section 2, Paragraph 3, of the New Jersey Constitution must give way to the superior mandate of the federal statute by operation of the Supremacy Clause, U.S. Const. art. VI, cl. 2. *McNeil*, 177 N.J. at 384-88, 828 A.2d at 852-55, Pet. App. 19a-24a.

Second, the New Jersey Supreme Court held that the state constitutional provision was, in any event, unenforceable by reason of New Jersey's doctrine of "contemporaneous and practical construction." *McNeil*, 177 N.J. at 389, 828 A.2d at 855, Pet. App. 25a. That state-law doctrine requires "that when construing a [state] constitutional provision, the long and unchallenged usage and practical interpretation by those charged with implementation, enforcement and administration of the provision will prevail over the strict construction of the provision." *Id.* at 391, 828 A.2d at 856, Pet. App. 28a. Applying the state-law doctrine to the state constitutional provision before it, the New Jersey Supreme Court determined that, in view of decades of nonenforcement of the constitutional provision by the New Jersey courts as well as by executive- and legislative-branch officials, the constitutional provision was without force and effect. *Id.* at

392, 828 A.2d at 857, Pet. App. 29a (holding that "[a]pplication of [the contemporaneous and practical construction] doctrine to the present case would support the conclusion that the common and unanimously agreed-upon understanding of this Court, and the legal and political communities of this State as well, is that the two-district limitation for Newark and Jersey City *must be ignored*" (emphasis added)). Thus, the court held that the state-law doctrine of "contemporaneous and practical construction" – by itself – rendered unenforceable Article IV, Section 2, Paragraph 3, of the New Jersey Constitution.

Third, the New Jersey Supreme Court held that New Jersey's doctrine of claim preclusion separately barred the claim before it, regardless of the previously considered federal and state substantive doctrines that each provided an adequate and independent basis for dismissal of Petitioners' claim. *Id.* at 393-400, 828 A.2d at 857-62, Pet. App. 30a-40a. The court first expressly identified the source of authority for the doctrine of claim preclusion as Article VI, Section 3, Paragraph 4 of the New Jersey Constitution and the implementing state-court rules. *Id.* at 394, 828 A.2d at 858, Pet. App. 32a. Applying the claim-preclusion doctrine, the court determined that Petitioners were in privity with the plaintiffs in two earlier federal-court cases that had unsuccessfully challenged the Plan. *Id.* at 397, 828 A.2d at 860, Pet. App. 36a (citing *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (three-judge court); *Robertson v. Bartels*, 148 F. Supp. 2d 443 (D.N.J. 2001) (three-judge court), *summarily aff'd*, 534 U.S. 1110 (2002)). Petitioners DiGaetano and O'Toole had both been plaintiffs in *Page v. Bartels*. After considering the essential similarities of parties, rights, and remedies in this litigation and in the prior *Page* and *Robertson* cases, the court concluded that "the doctrine of claim preclusion also would lead us to the

striking of the complaint." *Id.* at 393, 828 A.2d at 857, Pet. App. 30a.

In short, the New Jersey Supreme Court's decision is expressly based on (1) the application of the Voting Rights Act, a federal statute; (2) the doctrine of "contemporaneous and practical construction," a state-law doctrine; and (3) the doctrine of claim preclusion, a state-law doctrine. Petitioners here challenge only the state court's application of the Voting Rights Act.

Petitioners do not – and, of course, cannot – seek review by this Court of the New Jersey Supreme Court's application of state law. Petitioners apparently recognize that this Court lacks jurisdiction to review state-court decisions grounded in state law.

But Petitioners, in seeking review by this Court of the New Jersey Supreme Court's application of federal law, ignore an equally fundamental limitation on this Court's jurisdiction that applies when a state court expressly bases its decision on federal- and state-law grounds, and the state-law grounds independently support the state court's decision. Those circumstances clearly apply here and preclude this Court from reviewing the case.

REASONS FOR DENYING THE PETITION

I. THE JUDGMENT OF THE NEW JERSEY SUPREME COURT RESTS ON TWO INDEPENDENT AND ADEQUATE STATE GROUNDS.

Long ago, this Court recognized that it lacks jurisdiction to review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125-

26 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state law grounds."); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1872). In recent years, the Court has repeatedly reaffirmed this fundamental restraint on the exercise of the Court's jurisdiction over state-court decisions. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 375 (2002); *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997); *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Harris v. Reed*, 489 U.S. 255, 260-61 (1989).

The rationale underlying the jurisdictional limit on the Court's authority has been succinctly stated: "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. at 729-30. The Court is "not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. at 125-26; *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

Here, this doctrine of adequate and independent state-law grounds compels the conclusion that this Court lacks jurisdiction to review the judgment below. As previously noted, the New Jersey Supreme Court's decision upholding the New Jersey Legislative Apportionment Plan was based expressly on *three* separate and distinct grounds: (1) the preemptive effect of the Voting Rights Act, 42 U.S.C. § 1973, as applied to the state constitutional provision at issue here; (2) the doctrine of "contemporaneous and practical construction," a state-law doctrine that precludes the enforcement of a New Jersey constitutional provision when, as here, it has consistently gone unenforced by New Jersey courts and government officials for an extended period; and (3) the New Jersey doctrine of claim preclusion, which barred Petitioners from asserting their claim in this case. *McNeil*, 177 N.J. at 374-400, 828 A.2d at 845-62, Pet. App. 6a-40a.

Thus, of the three grounds expressly identified by the New Jersey Supreme Court as supporting its decision, only the first is premised on federal law. The other two grounds arise under New Jersey law.

That the two state-law grounds expressly relied on by the state court below are "independent" and "adequate" is beyond question. In *Michigan v. Long*, this Court made clear that the "independence" and "adequacy" of state-law grounds are conclusively established merely by virtue of the opinion of the state court containing "a plain statement that [its] decision rests upon adequate and independent state grounds." 463 U.S. at 1042; *see also Harris v. Reed*, 489 U.S. 255, 261 (1989) (holding that the "[t]he *Long* 'plain statement' rule applies regardless of whether the . . . state-law ground is substantive . . . or procedural").

The *Long* "plain statement" rule precludes review of the state-court decision below. As to the New Jersey Supreme Court's determination that the Petitioners had failed to state a claim by operation of New Jersey's doctrine of "contemporaneous and practical construction," the opinion of that court contains the following "plain statement":

> Although we rest our decision on the Supremacy Clause, we nevertheless point to other well-accepted doctrines in our jurisprudence that would lead to the same result. First, is the doctrine of contemporaneous construction. Since Article IV, Section 2, Paragraph 3 was added to our State Constitution in 1966, Newark and Jersey City have been divided into at least three districts. The issue in the past has been where to draw the district lines for each of the three or more districts for Newark and Jersey City and not whether there should be only two districts in each municipality. Based on the decisional law, and the long-standing, unchallenged history of certifying redistricting plans that divided Newark and Jersey City into three or more districts notwithstanding our State Constitution's political boundary requirements, we find the doctrine of contemporaneous and practical construction to be applicable.
>
> * * *
>
> Application of that doctrine to the present case would support the conclusion that the common and unanimously agreed-upon understanding of this Court, and the legal and political communities of this State as well, is that the two-district limitation for Newark and Jersey City must be ignored.

McNeil, 177 N.J. at 388-92, 828 A. 2d at 854-57, Pet. App. 24a-29a.

Similarly, the opinion of the state court below contains the following "plain statement" that the doctrine of claim preclusion serves as an alternative state-law ground to support the court's decision:

> *In addition to the [doctrine of] contemporaneous construction, the doctrine of claim preclusion also would lead us to the striking of the complaint.*
>
> * * *
>
> The genesis of the claim preclusion doctrine predates our 1947 Constitution. As early as 1933, the highest Court in this State declared that "[n]o principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon." *Smith v. Red Top Taxicab Corp.*, 111 N.J.L. 439, 440-41, 168 A. 796, 797 (N.J. E. & A. 1933). That concept was incorporated into the Judicial Article of the 1947 Constitution.
>
> * * *
>
> Republican legislators and voters twice have challenged the Bartels redistricting plan in the federal district court, which has twice rejected their claims. *Page, supra*, 144 F. Supp. 2d at 346; *Robertson, supra*, 148 F. Supp. 2d at 443, *summarily aff'd*, 534 U.S. 1110, 122 S. Ct. 914, 151 L. Ed. 2d 881 (2002).
>
> * * *
>
> The *McNeil* plaintiffs assert in their state-law claim that anything except a two-district plan for Newark and Jersey City would violate Article IV, Section 2, Paragraph 3, of the New Jersey Constitution. We also could preclude plaintiffs from proceeding with this litigation based on the doctrine of *res judicata*.

McNeil, 177 N.J. at 393-97, 828 A.2d at 857-60, Pet. App. 30a-36a (emphasis added).

In short, the decision of the New Jersey Supreme Court could not be clearer: The state-law doctrines of "contemporaneous construction" and claim preclusion each independently support the judgment of the court dismissing the complaint. The *Long* "plain statement" rule is easily satisfied. *See Long*, 463 U.S. at 1042. Because the decision below is based on independent and adequate state-law grounds, this Court is without jurisdiction to hear this case.

II. THIS CASE WOULD BE AN EXTRAORDINARILY POOR VEHICLE FOR DECIDING WHETHER SECTION 2 OF THE VOTING RIGHTS ACT SOMETIMES MANDATES THE CREATION OF DISTRICTS IN WHICH PROTECTED MINORITIES CONSTITUTE LESS THAN HALF OF THE VOTING POPULATION BUT EXERCISE SUBSTANTIAL CONTROL OVER ELECTION OUTCOMES.

Even if there were no jurisdictional bar present here, this case would not be an appropriate opportunity for this Court to address the question whether Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, can, in some circumstances, require creation of districts in which minorities constitute less than an absolute majority of the population. This is indeed an important issue on which the lower courts are not in full agreement. But this case would be a very poor vehicle to address the issue, for two reasons.

First, Petitioners did not bring a claim under Section 2 of the Voting Rights Act. Their claim arose under the New Jersey Constitution. The Voting Rights Act entered the equation only as a defense, once Respondents cited the tension between the federal statute and the state constitution.

Thus, this case does not squarely present the federal-law issue.

Second, the New Jersey Supreme Court's ruling came on appeal from the trial court's summary dismissal of the complaint on non-Voting Rights Act grounds. Neither side presented live witnesses, much less the detailed expert testimony on demographics and voting patterns that is the hallmark of any serious Voting Rights Act case. When the Court addresses the issue raised by Petitioners, it should do so in a case with a full factual record concerning voting patterns in a particular State that dictate the percentage of district population that members of minority groups require in order to have a fair opportunity to participate in the political process and to elect candidates of their choice. While the New Jersey Supreme Court felt that it had a sufficient basis to find preemption here, relying on its knowledge of local circumstances as well as the prior federal cases adjudicating challenges to the same redistricting plan under the Voting Rights Act and the U.S. Constitution, that does not mean that this Court should select this case to resolve the important question whether plaintiffs in cases actually brought under the Voting Rights Act may, in appropriate circumstances, demand creation of "coalitional" districts in which minorities have the power to elect candidates of their choice in combination with non-minority voters.

In any event, the court below correctly declined to limit the Voting Rights Act to claims seeking creation of *majority*-black or *majority*-Latino districts. This case illustrates why Section 2 should not be interpreted as requiring creation of majority-minority districts in all settings, but should instead be interpreted as allowing the creation of "coalitional" districts where the minority share of the voting population is

sufficiently large that members of that group have a fair opportunity to nominate and elect their preferred candidates. *Cf. Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511-17 (2003) (applauding the creation of minority "coalitional" districts under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c); *id.* at 2518 (Souter, J., dissenting) (agreeing with the majority opinion as to "coalitional" districts).

The New Jersey apportionment plan used in the 1990s featured districts with heavier concentrations of minorities in and around the Newark and Jersey City areas, and as a result, minorities were substantially underrepresented in the Senate and Assembly. The new map that the Respondent Commission adopted in 2001 unpacked these districts, spread African-American and Latino voters among more districts, and thus increased minority electoral opportunities. A three-judge federal district court then upheld that feature of the map against a Voting Rights Act challenge, ruling that there is no obligation to re-pack minorities to achieve concentrations above 50 percent or more. *See Page v. Bartels*, 144 F. Supp. 2d at 348-69. Two of the Petitioners and their co-plaintiffs initially filed a notice of appeal to this Court, but when the June 2001 Democratic primaries resulted in a record number of African-American and Latino candidates being nominated (in heavily Democratic districts where nomination was tantamount to election), Petitioners and their co-plaintiffs dropped the appeal.

In the November 2001 general elections, these African-American and Latino Democratic nominees all prevailed, giving New Jersey a record number of minority legislators. Moreover, these gains in minority officeholding, or "descriptive representation," did not come at any cost to the minority groups' "substantive representation." Democrats retook control of the Assembly in the first elections held under the 2001 Plan, and minority Assembly members were

thus elevated to committee and subcommittee chairmanships. Likewise, in the November 2003 general elections, also held under the 2001 Plan that Petitioners challenge here, minority candidates once again won in record numbers. And the Senate switched to Democratic control, elevating minority Senators to chairmanships and other key leadership posts, too. All of this took place under a map whose districts are *more* racially and ethnically integrated than they were under the prior map. *See generally Georgia v. Ashcroft*, 123 S. Ct. 2498; *Shaw v. Reno*, 509 U.S. 630 (1993). Therefore, the 2001 Plan complies with the Federal Constitution, the Voting Rights Act, and the State Constitution, and should be left undisturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 1, 2003

(3)

No. 03-652

Supreme Court, U.S.
FILED
DEC 9 - 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ANNE M. McNEIL, THOMAS E. WILLIAMS, ROSEANNA SIEBERT, PAUL DiGAETANO and KEVIN J. O'TOOLE,

Petitioners,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, DEFOREST B. SOARIES, Secretary of State of New Jersey, and JOHN FARMER, Attorney General of New Jersey,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY TO RESPONDENT'S OPPOSITION

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REPLY TO RESPONDENT'S OPPOSITION

Respondent Commission concedes the within petition raises "an important issue on which the lower courts are not in full agreement." Rb9. Respondent argues the requested writ should not issue because: 1) the New Jersey Supreme Court rested its decision not only on the Supremacy Clause, but also on "two independent and adequate state-law grounds"; and 2) the present case is "a very poor vehicle to address the issue." Rb9.

I. THE NEW JERSEY SUPREME COURT DID NOTPROVIDE THE REQUIRED CLEAR AND PLAIN STATEMENT THAT THE DECISION AT ISSUE RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The New Jersey Supreme Court did not **rest** its decision on "two independent and adequate state-law grounds." Rb4. Respondent Commission relies on the language of the decision stating "[a]lthough we **rest** our decision on the Supremacy Clause, we nevertheless point to other well-accepted doctrines in our jurisprudence that **would lead** to the same result." (emphasis supplied). *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 388, 828 A.2d 840, 854 (2003) (App. 24a). Here the Court "point[ed] to . . . "contemporaneous construction" and "claim preclusion" and noted these "well-accepted [state-law] doctrines" **would lead** to the same result. But the Court did not **rest** its decision on these state-law grounds. Instead, the Court explicitly **rested** the decision on the Supremacy Clause. *Id.*; *see also McNeil*, 177 N.J. 364, 371, 828 A.2d 840, 843-44 (2003) (App. 2-3a). ("The

New Jersey Constitution's political boundary requirement" cannot be enforced "without violating the Supremacy Clause.") The rule of law that decided the case, according to the New Jersey Supreme Court opinion, was the Supremacy Clause.

Where a state court opinion **does** address and resolve a federal question, here the demand for influence districts under the VRA, the "mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state-law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahim*, 410 U.S. 623, 630-631 (1973); *and see Orr v. Orr*, 440 U.S. 168, 276-77 (1979), and cases cited; *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 242 (1983).

Twenty years ago, this Court, in *Michigan v. Long*, 463 U.S. 1032 (1983), imposed on state courts the obligation to ***clearly*** state their decision **rested** on state-law grounds, if the court wanted to avoid having an ambiguous opinion lead to jurisdiction in this Court. *Michigan* held a state court must provide a "'plain statement' that a decision rests upon adequate and independent state grounds. . . ." *Michigan v. Long*, 463 U.S. at 1042.

The New Jersey Supreme Court failed to provide any plain and clear statement that the Court's decision in this case **rested** on independent and adequate state-law grounds. In fact, nowhere in the opinion did the New Jersey Supreme Court explicitly state the decision **rests** on state-law grounds. Instead, every time the New Jersey Supreme Court discussed the effect of "contemporaneous construction" and/or "claim preclusion" on the Court's

decision the Court used the future tense.[1] In addition to the language quoted above, and relied upon by Respondent, *see McNeil*, *supra*, at 392, 828 A.2d at 857 (App. 29a) ("Application of that doctrine to the present case **would support** the conclusion . . ."); *Id.* at 393, 828 A.2d at 857 (App. 30a) ("In addition to the contemporaneous construction (sic), the doctrine of claim preclusion also **would lead** us. . . ."); *Id.* at 397, 828 A.2d at 860 (App. 36a) ("We also **could preclude** plaintiffs from preceding. . . ."). The future tense indicates that an action is in the future relative to the writer. To argue the Court "**rests**" its decision on these state-law grounds renders this choice of language by the New Jersey Supreme Court meaningless.

Certainly, the Court could have clearly stated the decision rested on state-law grounds. Presumably the New Jersey Supreme Court was aware of this Court's twenty-year old jurisdictional precedent.[2] If these state-law grounds, alone, rendered the New Jersey Constitutional provision unenforceable, the New Jersey Supreme Court had no reason to explicitly rest its decision on the Supremacy Clause, instead of these state-law grounds.

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[1] The future tense employs the helping verbs will or shall with the base form of the verb, e.g. "would lead."

[2] In this context it is worth remembering the obvious: three Justices of the New Jersey Supreme Court dissented, unpersuaded by the majority's view of the impact of these state-law doctrines.

II. THE STATE-LAW GROUNDS DISCUSSED IN THE NEW JERSEY SUPREME COURT OPINION ARE NOT INDEPENDENT AND ARE NOT ADEQUATE

1. The doctrine of contemporaneous construction is not independent or adequate

The New Jersey Supreme Court concluded "[w]hen the decision of the Commission is viewed within the framework of the contemporaneous and practical construction doctrine . . . it becomes clear that to construe strictly the language of Article IV, Section 2, Paragraph 3 would . . . violate Section 2 of the VRA." *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 392-93, 828 A.2d at 857 (2003) (App. 30a). This state-law basis is "interwoven with the federal law," *Michigan v. Long*, 463 U.S. at 1040. The opinion demonstrates the Court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner that it did." *Michigan v. Long*, *supra*, at 1038, n.4. Contemporaneous construction is not, according to the opinion below, an independent basis.

Nor is contemporaneous construction an adequate ground for the decision. As pointed out by Justice LaVecchia in her cogent dissent in *McNeil*, the doctrine of contemporaneous construction applies, if at all, only when the issue concerns an interpretation of the provision, the meaning of the words, not when the issue is the enforceability of unambiguous language. *McNeil*, 177 N.J. at 405-06, 388, 828 A.2d at 865 (App. 47a) (LaVecchia, J., dissenting).

2. The doctrine of claim preclusion is not adequate in this case

Although the doctrine of claim preclusion may be independent, it is in no way adequate. The challenged Plan was filed on April 11, 2001. *McNeil*, 177 N.J. at 372, 828 A.2d at 844 (App. 3a). The Petitioner's complaint was filed exactly **four weeks** later, on May 9, 2001. *Id.* at 373, 828 A.2d at 845 (App. 5a). It is true that *Page v. Bartels*, 144 F.Supp.2d 346 (D.N.J. 2001), was decided on May 7, 2001, two days before Petitioners filed. But there is considerable doubt the *Page* Court would have accepted jurisdiction of Petitioners' claim. *See Stephenson v. Bartlett*, 180 F.Supp.2d 779 (E.D.N.C. 2001) (remanding to state court a state constitutional challenge to an adopted plan defended by a VRA demand for influence districts). Certainly, if Petitioners filed the complaint on May 6, 2001, three days earlier, claim preclusion would not have thwarted Petitioners' claim. The doctrine does not apply to a second suit involving the same issues and parties instituted while the first action is still pending. *See Kaselaan & D'Angelo Associates, Inc. v. Soffian*, 290 N.J.Super. 293, 297-300, 675 A.2d 705, 707-709 (App. Div. 1995).

In addition, two of the four Petitioners are individual voters, not named as plaintiffs in *Page*. Even the two Petitioners who were nominally in *Page* were there only as part of the "Assembly Republican Majority." It is hard to see how this equitable doctrine applies when Petitioners cannot be said to have neglected their rights, two of the Petitioners were not involved in *Page*, the remaining Petitioners were only nominally in *Page*, and it is unclear the *Page* Court would have accepted jurisdiction.

If claim preclusion, standing alone, provided the deciding rule of law in this case, there was no need for the New Jersey Supreme Court to explicitly rest its decision on the Supremacy Clause. It seems hardly likely the New Jersey Supreme Court would have invoked claim preclusion, since the parties did not brief it,[3] if the Court understood the VRA did not prohibit enforcement of the New Jersey Constitution. Plaintiffs seeking enforcement of a constitutional provision the Court believes should be enforced, are seldom equitably estopped because the complaint, filed within four weeks of the challenged governmental action, comes three days after a different challenge to the same governmental action was dismissed.

Even if claim preclusion is considered an independent and adequate state ground, this Court is not without jurisdiction. Districting is a once a decade process. The challenged decision, without correction, rewrites the New Jersey Constitution, based on a misunderstanding of Federal Law. The decision forever forecloses New Jersey from enforcing the municipal boundary provision adopted by the people of New Jersey as an amendment to New Jersey's Constitution. But a reversal by this Court on the federal question raised will resurrect the municipal boundary provision for 2010, even if the New Jersey Supreme Court rests a future dismissal on claim preclusion.

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[3] *McNeil*, 177 N.J. at 399, 828 A.2d at 861 (App. 38a).

III. THERE ARE NO DEFECTS IN THIS CASE AS A VEHICLE FOR RESOLUTION OF THIS IMPORTANT ISSUE BECAUSE OF THE WAY THE ISSUE WAS RAISED, OR BECAUSE OF THE STATE OF THE RECORD

When a vote dilution claim based on failure to create influence districts is made, either by challengers seeking to invalidate a plan, or by drafters defending a plan against a state constitutional challenge, the claimant must prove the three *Gingles* preconditions. *Thornburg v. Gingles*, 408 U.S. 30, 50-52 (1986). It is simply insignificant whether the claim for VRA compelled influence districts occurs as a defense to a plan, as in this case and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (N.C. 2003), or is the cornerstone of a challenge to a plan, as in *Parker v. Ohio*, 263 F.Supp.2d 1100 (S.D.Ohio 2003), *summarily affirmed*, ___ U.S ___, 72 USLW 3193, 3339, 3346 (U.S. Ohio Nov. 17, 2003) (No. 03-411) and *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003). The party demanding influence districts must prove the three *Gingles* preconditions in either case.

Two Federal Courts have recently resolved the question of whether a full trial record is necessary when there is a demand for influence districts. However, the decisions are in conflict. In the Eastern District of Virginia, in *Hall v. Virginia*, 276 F.Supp.2d 528 (E.D.Va. 2003), plaintiffs sought to compel an increase in a specific district's "black total population . . . to approximately 40%" from 33.6% in the challenged plan. This same district had a 39% total black population in the prior plan. *Id.* at 530. The *Hall* Court dismissed the challenge demanding influence districts on a *Rule* 12(b)(6) motion, without a trial record. But just two and one half months after the decision in

Hall, the First Circuit reversed a District Court Judge's 12(b)(6) dismissal of a demand for influence districts identical to the demand in *Hall*. In *Metts v. Murphy*, 347 F.3d 346 (CA1 2003), plaintiffs argued a 26% African-American district would pass muster, but the challenged 21% district would not. The District Court dismissed the complaint on a *Rule* 12(b)(6) motion, as the district court in *Hall* had done. But the First Circuit reversed, with one Judge dissenting.

The first *Gingles* precondition, and arguably the second, does not require a full trial record for determination. The majority in *Parker v. Ohio*, 263 F.Supp.2d 1100 (S.D.Ohio. 2003), *summarily affirmed*, __ U.S. __ (2003), needed no more than is present here to reject an identical claim for influence districts. The New Jersey Supreme Court seized on this "*Parker* demand" to sustain Respondent Commission's admitted failure to abide by the municipal boundary provision of the New Jersey Constitution, explicitly relying on the dissenting view expressed by Judge Gwin in *Parker*. *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 387, 828 A.2d at 853 (2003) (App. 22-23a). In *Parker*, however, the majority held that a demand for influence districts, such as the demand raised as a defense by Respondent Commission in this case, failed to state a claim because the undisputed demographics demonstrated plaintiffs were unable to satisfy the first *Gingles* precondition.

This first *Gingles* factor requires the Court to find the minority community "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles at* 50. The analysis under this precondition only requires a review of the census numbers in the districts created by the plan. It is not until the analysis

turns to the third precondition that the "detailed expert testimony on demographics and voting patterns that is the hallmark of any serious Voting Rights Act case," Rb10, championed by Respondent, comes into play.[4] The issue of influence districts under the VRA can and should be decided without "expert testimony on demographics and voting patterns," as it was in *Parker*, *Hall*, and by the New Jersey Supreme Court here.

Throughout the country, the issue of whether or not influence districts are required by the VRA has divided the lower courts. The demand for influence districts appears both as a challenge to a plan, as in *Parker* and *Hall*, and to defend a plan, as in this case, and in *Stephenson*. The lower courts, and the States, badly need guidance on these demands for influence districts under the VRA.

The facts essential to a determination of Respondent's demand for influence districts in this case are not, and never have been, in dispute. The undisputed population figures for the districts created by the 2001 Plan are part of the Superior Court, Appellate Division opinion. *McNeil v. Legislative Apportionment Commission*, 357 N.J.Super. 74, 81-84, 813 A.2d 1264, 1268-1270 (App. Div. 2003) (App. 78a-81a). The numbers demonstrate that Respondent's 2001 Plan created influence districts out of voters the New Jersey Constitution required be part of one of four majority-minority districts in New Jersey's largest cities. Respondent not only does not dispute the Commission

[4] In any case the *Page* decision contains most of the needed testimony for a majority of the districts at issue. *Page v. Bartels*, 144 F.Supp.2d 346, 353-62 (D.N.J. 2001).

created influence districts as described, Respondent successfully argued below these influence districts were compelled by the VRA. *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 384, 828 A.2d at 852 (2003) (App. 19a) ("To now create two districts each in Newark and Jersey City would, in the Commission's view and supported by the record, constitute packing in violation of Section 2 of the VRA.").

This case provides a perfect opportunity to decide the issue. If the New Jersey Supreme Court was correct, *Metts* is correct, and States must yield to a demand for influence districts to avoid a VRA challenge. If, on the other hand, *Parker* and *Hall* are correct, the decision of the New Jersey Supreme Court in this case must be reversed. Reversal communicates to the fifty States that they are free to redistrict without yielding to the demand for influence districts.

CONCLUSION

For all the above reasons the requested Writ of Certiorari should issue.

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